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**When the Past Remains Present:  
Developing Truth Commission Guidance Frameworks to Assist  
Transitional and Post-Conflict States**

**Matthew D. Crowcombe**

**Submitted to Swansea University in fulfilment of the requirements for the Degree of  
Doctor of Politics**

**Swansea University**

**2012**

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## **Abstract**

The world is currently afflicted by unstable and undemocratic political systems which are frequently a product of failed political transitions. At the point of transition, states are often presented with the unique opportunity to address past human rights violations and restore divided societies, through the implementation of thorough and effective transitional justice processes; truth commissions remain one of the most influential tools in orchestrating these practices. However, as recent history demonstrates, when implemented incorrectly, the transitional justice processes facilitated by truth commission enquiries can not only be ineffective but also damaging.

To account for these inadequacies, this thesis seeks to address three key issues: a common misunderstanding of the core concepts promoted by truth commission investigations, the need to notate and comprehend the positive and negative outcomes of past commission enquiries and the current lack of 'case-specific' guidance for future truth commission architects. With reference to these studies, the thesis will then seek to develop a three-pronged truth commission guidance framework to account for the three modes of political change through which transitional states can pass and recommend the establishment of a 'Truth Commission Advisory Body' to oversee and assist the process. These frameworks will then be applied to the case study of Zimbabwe, which is considered to be a candidate for political transition in the near future.

The current proliferation of truth commission investigations reflects the common belief that they are the best response when confronting a transitional state's troubled past; this belief can only be vindicated by a substantial increase in the positive and lasting effects of future commission endeavours. Ultimately, this will only be achieved by an increased understanding of these complex processes and the provision of more extensive guidance to those seeking to foster them; this thesis represents a step closer to this eventuality.

## **Declaration**

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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### **STATEMENT 1**

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I am most indebted to Claudia for always believing in me!

## **In Memory of Colin Zietsman**

*I hope this thesis can help contribute in some way, towards the  
restoration of the country you loved so much.*

## **Introduction**

“In virtually every state that has recently emerged from authoritarian rule or civil war, and in many still suffering repression or violence, but where there is hope for transition soon, there has been interest in creating a truth commission – either proposed by officials of the state or by human rights activists or others in civil society.”<sup>1</sup>

Since the collapse of communism and the end of the cold war, increasing numbers of states have undergone political transition from authoritarian rule and conflict in an attempt to achieve relative peace and stability through more democratic forms of governance. At present these transitions are currently occurring across Northern Africa and the Middle East as a result of the ‘Arab Spring.’

As part of this transitional process, newly formed governments are pushed to decide how they are going to deal with past human rights violations committed by former regimes and power groups: “When a period of authoritarian rule or civil war ends a state and its people stand at a crossroads.”<sup>2</sup> In response to this predicament, it is now increasingly commonplace for these governments to facilitate transitional and restorative justice processes in order to address these violations and promote accountability without damaging their often fragile and vulnerable political systems.

Out of the various transitional justice options available to transitional and post-conflict states, in recent years, truth commissions have rapidly become the popular choice when confronting a country’s history of human rights violations. They achieve this by attempting to unearth the truth behind past atrocities, and by helping both victims and perpetrators confront and acknowledge these truths. Then through the implementation of various restorative initiatives and often in co-ordination with other transitional justice practices, these bodies can help encourage said individuals and groups to reconcile their differences and peacefully coexist within their societies.

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<sup>1</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p23.

<sup>2</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p4.

That being said, a thorough analysis of the truth commission investigations to date would show that they have often fallen well short of their stated objectives. Such a study would attribute these failings to the lack of power and influence granted to commissions in their mandates; these limitations have prevented past commissions from establishing accountability, providing victims with socio-economic restitution, influencing effective processes of reform and even preventing impunity. There is also strong evidence to suggest that past commissions have not only suffered from a lack of government support, but have also been subject to government manipulation. Past commission investigations have also been blighted by poor communication, a poor representation of different cultural and gender groups and the failure to protect the basic civil liberties of those involved in the process. As a consequence, despite their apparent proliferation, it is very difficult to reference a past truth commission enquiry which has fulfilled all of the requirements stated in its mandate.

Given that truth commission investigations have been in operation since the introduction of the Ugandan Truth Commission in 1974, why is it that the more recent truth commission enquiries still suffer from the aforementioned flaws? The opening chapters of this thesis seek to account for the prevalence of these fundamental shortcomings by addressing three key issues:

1. **A misunderstanding of the core concepts promoted by truth commission investigations** – the success of any truth commission investigation is dependent on a comprehensive understanding of the core concepts which are embodied by its enquiry; namely truth, reconciliation and justice.

Investigating and disclosing the full truth behind past human rights atrocities is one of the central objectives of truth commission enquiries. A comprehensive understanding of the different types of truth encountered by investigations and the techniques which can be used to present these truths in a commission's final report is therefore a prerequisite to any enquiry. The possible negative impacts of the truth should also be acknowledged; extensive truth seeking processes will not always be appropriate and in some instances can jeopardise potential recovery processes.

Particularly since the establishment of South Africa's Truth and Reconciliation Commission, promoting reconciliation is seen as one of the central functions of

modern day commissions. If future commissions are to continue performing this role, more appreciation of the complexities of these processes is required, including an understanding of the specific characteristics of both ‘macro’ and ‘micro-level’ reconciliation processes, the different stages of reconciliation through which a society can pass and the role of forgiveness. This thesis emphasises the importance of a society’s pre-existing commitment to justice in order to accommodate these processes; it states that this commitment can be fostered by religious and philosophical belief systems with specific reference to the influence of the Ubuntu philosophy in assisting reconciliation processes throughout transitional states in Africa.

Lastly, future commission investigations would benefit from a greater understanding of the potential roles of both retributive and restorative justice in assisting the transition process. Both of these practices and their justifications are explored here.

2. **The need to account for and understand the positive and negative outcomes of past truth commission investigations** – by accounting for the successes and failures of past truth commission enquiries; future commission architects can ensure that their structures benefit from the hindsight of these investigations.
  
3. **The lack of ‘case-specific’ guidance for future truth commission architects** – In recent years, NGOs and civil society groups have sought to provide guidance for governments considering the formation of truth commission enquiries. However, in most cases, this guidance is far too generalised and non-specific to benefit the architects of future commissions and prevent the recurrence of the aforementioned weaknesses of past commission investigations; this is demonstrated with reference to *‘Rule-Of-Law Tools for Post-Conflict States: Truth Commissions,’* a booklet published by the office of the United Nations High Commission for Human Rights. This publication is designed to assist states seeking to develop truth commission bodies in response to large scale human rights violations. The booklet itself provides a ‘truth commission’ definition, describes situations in which said bodies may be established, offers guidance on the physical structuring of truth commissions and discusses their main activities and the possible challenges which they may encounter.

Although this information may well be of some use to its target audience as a form of very basic assistance, in order to form ‘country specific truth commission models’<sup>3</sup> more detailed guidance is required including information relevant to states facing differing political, social and economic preconditions. It is the central argument of this thesis that the failures of past truth commission investigations can be attributed to the dearth of more case specific support for truth commission architects. It is generally agreed that ‘one-size-fits-all’ frameworks do not acknowledge the specific conditions which can result from different political transitions; it is therefore unsurprising that the guidance provided by NGO and civil society groups fails to accommodate these variations.

Once these issues have been addressed, the thesis will then seek to develop a three-prong truth commission advisory framework which can be developed to fill this void and provide future truth commission architects with more case-specific guidance when setting up their enquiries. Prior to the development of these frameworks, the thesis defines the type of political transition through which a state passes as the ‘key variable’ which has the greatest influence over the political, social and economic pre-conditions which have to be accommodated by truth commission investigations. As a consequence, each of the three frameworks presented by this thesis are moulded around the three types of political transition; ‘political overthrow,’ ‘political reform’ and ‘political compromise,’ as defined by Samuel Huntington and Jeremy Sarkin.<sup>4</sup> This approach will provide transitional states with specific guidance depending on the type of political transition which has occurred.

Furthermore, the thesis investigates the possibility of establishing a possible ‘Truth Commission Advisory Body’ designed to provide assistance with key phases of the development of future commissions. As well as providing specific advice regarding the application of the frameworks designed by this thesis, this organ could also assist with other important stages of the commission’s development, such as the drafting of its mandate and the selection of truth commissioners. This thesis recommends the newly formed United Nations Peacebuilding Commission as a possible candidate to fulfil this role; this is due to the

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<sup>3</sup> ‘Rule-of-law Tools for Post-Conflict States: Truth Commissions,’ (Office of the United Nations High Commissioner for Human Rights: New York, 2006) p5.

<sup>4</sup> Sarkin, Jeremy: “The Tension between Justice and Reconciliation in Rwanda,” (*Journal of African Law*: Vol.45, No.2, 2001) p145.

numerous overlapping ambitions shared by the recently created PBC and transitional justice processes.

The final chapter of the thesis will apply these frameworks to its main case study; Zimbabwe, after political transition. Zimbabwe is selected as a case study by this thesis because it is considered to be a potential candidate for regime change in the near future, and could be greatly assisted by comprehensive transitional justice processes; Zimbabwean civil society groups have been collating evidence in recent years for this exact purpose. However, there exists a great deal of uncertainty with regards to the type of political transition which will occur. One of the strengths of the three-prong approach promoted by this thesis is that it is able to accommodate each transitional eventuality. In preparation, the final chapter of the thesis applies each of these frameworks to a transitional Zimbabwe context; this will highlight the various political, social and economic conditions which can result from each of the modes of transition and provide specific guidance to help a future Zimbabwean truth commission accommodate these circumstances.

To summarise, this thesis aims to contribute towards a greater understanding of the potential impact transitional justice processes and truth commission investigations can have upon societies in political transition. By addressing the three aforementioned issues, and by developing a three-prong truth commission guidance framework to account for each of the three modes of political transition and by introducing a 'Truth Commission Advisory Body,' this thesis aims to provide the necessary support and guidance to encourage the development of more successful commission investigations in the future. It is hoped that this will end a lasting legacy of second-rate truth commission investigations and help more societies confront their turbulent histories in the hope of developing sustainable peace.

## **Chapter 1**

### **Defining 'Truth Commissions' as Successful and Effective**

#### **Transitional Justice Mechanisms**



## **Introduction:**

“Despite numerous studies, many cases, and extensive literature we know surprisingly little about transitional justice mechanisms.”<sup>1</sup>

Unsurprisingly, due to the scale and challenge of the task at hand and the contrasting political, social and economic make-up of these transitional societies, truth commissions are highly complex and diverse entities. This chapter will seek to explain and simplify these complexities to help create a better understanding of what truth commissions are, what they can achieve, and their role within an ever-present era of transitional justice politics.

By explaining the possible outcomes of truth commission investigations, with the help of both advocates and critics, the chapter will also address three processes key to the success of transitional and restorative justice practices; truth, reconciliation, and justice. To understand these concepts is to comprehend why truth commissions have gained increasing recognition in international and human rights politics. This understanding will also enable future truth commission architects to adapt the designs of their commission frameworks to ensure that they facilitate each of these processes throughout the course of their enquiries; if successful this will make a significant contribution towards the rehabilitation and restoration of previously divided transitional and post-conflict societies. A thorough analysis of the aforementioned concepts and processes will also greatly assist the development of our truth commission guidance frameworks in the latter stages of this thesis.

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<sup>1</sup> Olsen, Payne, Reiter: “Transitional Justice in Balance,” (Washington D.C: United States Institute of Peace Press, 2010) p160.

## Introducing Transitional Justice:

“Transitional Justice has become a constant in the political arena for nearly four decades.”<sup>2</sup>

Before focusing primarily on the impact and contributions made by truth commissions when investigating large-scale human rights violations committed by past authoritarian regimes, it is first necessary to understand the overall context within which these highly complex bodies are developed. This approach will allow for a more comprehensive understanding of the motives and aspirations of truth commission architects when they first set out to develop these mechanisms. The overall context referred to here is known as ‘Transitional Justice.’

Transitional justice arises from an era of thinking which reinforces the importance of upholding individuals’ basic human rights whilst strengthening democracy and peace within newly transitioned political systems. It was first developed in the 1970/80s in response to the various political transitions which were occurring throughout Latin America and Europe resulting from the fall of authoritarian regimes and the end of the Cold War. Its central goal was to assist these states with their transition to democracy.

As increasing numbers of states underwent political transition, when dealing with past gross human rights violations, it was recognised that the application of isolated retributive justice procedures (the prosecution of guilty parties through judicial proceedings), unaccompanied by any other process, was no longer effective. Although such a system is adequate when dealing with individual human rights breaches on a small scale, when dealing with ‘mass’ violations of human rights, on a large scale, it is ineffective at best; in these circumstances criminal justice processes are ill-equipped to promote the types of political, social and economic restoration required by transitional societies. “Justice systems are designed to handle crime as an exceptional occurrence.”<sup>3</sup> In addition, it is seldom the case that transitional and post-conflict states have the resources and infrastructures available to them to permit the pursuit of retributive justice processes on such a large scale.

As the inadequacies of retributive justice became increasingly evident and the overall growth of the field of human rights increased, the era of transitional justice was born. As was aptly stated by a representative of the United Nations, when defining transitional justice;

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<sup>2</sup> Olsen et al: “Transitional Justice in Balance,” (Washington D.C: United States Institute of Peace Press, 2010) p38/39.

<sup>3</sup> Freeman, Mark: “Truth Commissions and Procedural Fairness,” (Cambridge: Cambridge University Press, 2006) p10.

transitional justice promotes “justice in times of transition.”<sup>4</sup> It achieves this by seeking to “address effectively the systematic abuses of former regimes but still reinforce – and not derail – the political transformations that were underway.”<sup>5</sup> However, the justice referred to here is not justice as it was originally known (the prosecution and punishment of those guilty of breaking the law) but instead the provision of justice for society as a whole. This concept was effectively explained by Kofi Annan, the Secretary-General of the United Nations, in his report, *‘The rule of law and transitional justice in conflict and post-conflict societies,’* where he states that “the notion of transitional justice... comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>6</sup>

Since its abrupt entrance into the international political arena, political theory books are inundated with transitional justice definitions and analyses, each seeking to provide the most concise yet thorough definition of this complex concept. One of the more concise descriptions is presented in the introduction of Paul Gready’s most recent publication, *‘The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond’*: “The ideal makes way for the possible, although it never stops asking the possible for more.”<sup>7</sup> This stresses that, whilst transitional justice practices are often only selected when criminal justice procedures are implausible, this is a necessary compromise as they are considered better-equipped to deal with the challenges presented by transitional and post-conflict societies.

It seems that the most widely used transitional justice definition is provided by the International Centre for Transitional Justice: “Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they

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<sup>4</sup> The United Nations: ‘What is Transitional Justice?’ Available at: [http://www.un.org/fr/peacebuilding/wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/fr/peacebuilding/wgll/justice_times_transition/26_02_2008_background_note.pdf) (Last accessed June 22nd 2011).

<sup>5</sup> The United Nations: ‘What is Transitional Justice?’ Available at: [http://www.un.org/fr/peacebuilding/wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/fr/peacebuilding/wgll/justice_times_transition/26_02_2008_background_note.pdf) (Last accessed June 22nd 2011).

<sup>6</sup> Annan, Kofi: “Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies,” (U.N. Doc. S/2004/616, August 23, 2004) p4.

<sup>7</sup> Gready, Paul: *‘The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond,’* (Oxon: Routledge, 2011) p1.

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may take place over many decades.”<sup>8</sup> This particular definition notes the ability of transitional justice mechanisms to evolve and adapt to deliver for the differing needs and circumstances of the societies in which they operate.

In a recent assessment of the growing presence and impact of transitional justice practices in international politics, a study by Olsen, Payne and Reiter analysed the various transitional justice practices implemented across 161 different countries over the past 37 years.<sup>9</sup> These figures alone demonstrate the rapid proliferation of these processes across the globe.

Transitional justice also has a growing presence within international law having been endorsed by the European Court of Human Rights and United Nations treaty bodies such as the Human Rights Council: “The Commission on Human Rights regularly adopted a series of resolutions that address questions of impunity, the right to restitution, and forensic science.”<sup>10</sup>

Throughout his analysis of the growth of transitional justice as ‘an industry,’ Gready asks important questions about the driving forces behind the rapid development of transitional justice policy. He discusses whether or not transitional justice has developed into an ‘international movement’ spearheaded by an ‘international, knowledge-based, elite professional and donor network’ rather than existing as a series of regional initiatives driven by local authorities and representatives.<sup>11</sup> He shows concern over the ‘holistic’ presentations of transitional justice processes now provided by international advisory bodies, following the successes of South Africa’s Truth and Reconciliation Commission: “Definitions become too broad to be meaningful.”<sup>12</sup> This thesis echoes these concerns, arguing that transitional justice mechanisms should never be seen as a ‘one-size-fits-all’ solution suitable for every scenario; international advisory bodies would be better advised to provide a series of detailed frameworks which can be adapted to accommodate and account for specific political, social and economic contexts.

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<sup>8</sup> “What is Transitional Justice?” (International Centre for Transitional Justice: 2009) Available at: <http://ictj.org/about/transitional-justice> (last viewed March 18th 2012).

<sup>9</sup> Olsen et al: “Transitional Justice in Balance,” (Washington D.C: United States Institute of Peace Press, 2010) p4.

<sup>10</sup> “Transitional Justice in the United Nations Human Rights Council,” (International Centre for Transitional Justice: June 2011) Available at: <http://ictj.org/publication/transitional-justice-united-nations-human-rights-council> (last viewed: March 18th 2012) p3.

<sup>11</sup> Gready, Paul: “The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond,” (Oxon: Routledge, 2011) p3-4.

<sup>12</sup> Gready, Paul: “The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond,” (Oxon: Routledge, 2011) p3-4.

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Given its apparent rapid growth and international influence, political analysts have also set about trying to determine the exact contribution of transitional justice practices in transitional and post-conflict states. Rather surprisingly, to date, the results are not overly encouraging for transitional justice advocates. Although the empirical analysis results published by Olsen et al for example, suggest that “in general [transitional justice] appears to have a positive and significant influence on democracy and human rights”<sup>13</sup> the outlook is not so positive for transitional justice mechanisms working in isolation from other transitional justice tools. Some results even show that operating independently, truth commissions, for example, have a negative impact upon strengthening democracy and promoting human rights practices in transitional and post-conflict societies: “Those countries that only use truth commissions are likely to experience a decrease in measures of democracy and human rights.”<sup>14</sup> What could possibly account for these findings?

In a recent report entitled ‘*State-Level Effects of Transitional Justice*,’ Thoms, Ron and Paris claim that these results could be considered as inaccurate and inconclusive.<sup>15</sup> They suggest that better testing procedures need to be developed as current methods use biased statistics and fail to account for the impact of other factors. Indeed it may be virtually impossible to devise an entirely accurate method of assessing the impact of transitional justice practices in the future.

If the negative results produced by these tests are vindicated, this thesis suggests that despite that vast amounts of literature now covering the subject, this stems from a lack of understanding of how and when transitional justice processes can and should be implemented. The fact is that there seems to be too much discussion about what should be done and little guidance provided showing how this can be achieved. The aforementioned holistic definitions and guidelines which are now commonplace, may well fit nicely into our theory books but do little to assist states seeking to implement successful transitional justice practices within their own political, social and economic contexts.

That is not to say that this will be an easy process. After forty years of analysis, it is apparent that we are still struggling to get to grips with the essence of this highly complex subject.

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<sup>13</sup> Olsen et al: “Transitional Justice in Balance,” (Washington D.C: United States Institute of Peace Press, 2010) p146.

<sup>14</sup> Olsen et al: “Transitional Justice in Balance,” (Washington D.C: United States Institute of Peace Press, 2010) p153.

<sup>15</sup> Oskar Thoms, James Ron and Roland Paris: “State-Level Effects of Transitional Justice: What do we Know?” (*The International Journal of Transitional Justice*, 2010, 1-26).

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These complexities should not be underestimated: “Transitional justice is the art of imperfect solutions and difficult choices, in the context of competition for finite resources and delicate political dynamics.”<sup>16</sup>

These complexities are a consequence of the vast array of issues which transitional justice mechanisms must confront; each mechanism must be moulded according to the characteristics of the specific transitional society within which they are to operate. Some of these issues will now be addressed.

### **Problems Faced by States Undergoing Political Transition**

According to Priscilla Hayner, as written in *‘Unspeakable Truths: Facing the Challenge of Truth Commissions’*,<sup>17</sup> the following problems are faced by states undergoing political transition:

1. They have to attempt to reconcile their societies in order to accommodate both victims and perpetrators of gross violations of human rights.
2. They have to deal with their nation’s troubled pasts and decide whether or not it is in the interests of peace to either forget or acknowledge past atrocities.
3. They have to decide whether to punish or to grant amnesty to those guilty of the human rights abuses in question.
4. They have to take the steps necessary to ensure that atrocities are not repeated, whether by the introduction of various societal reforms or through the removal of those responsible from positions of power and influence.

Although the above problems have only summarised the tasks faced by newly established governments when attempting to create stable democracies within their fractured societies, they do demonstrate the inadequacies of the retributive justice system (see the retributive v restorative debate) when dealing with states under political transition. For example, how

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<sup>16</sup> Gready, Paul: “The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond,” (Oxon: Routledge, 2011) p7.

<sup>17</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p4.

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would a judicial process (which may itself have been corrupted by the state) successfully reconcile a society and provide victims with the reparation and reimbursement they deserve?

The aforementioned problems do not account for other structural and localised issues faced by states undergoing political transition. For example, the societal infrastructures of many states recovering from authoritarian leadership are often damaged or destroyed. The destruction of a state's judiciary for example would make the pursuit of domestic judicial processes impossible. It is also important to understand that every transition is different and presents new problems which must be dealt with by the governments in question. Each of these political, social and economic contextual issues will be explored in greater detail when assessing the tasks faced by truth commissions later in this chapter. They are referred to briefly at this point to emphasise the role which must be played by transitional justice mechanisms and to demonstrate the inadequacies of the sole implementation of criminal prosecutions when dealing with the mass atrocities carried out by former authoritarian governments. This realisation grew significantly throughout the 1980s/90s as increasing numbers of states sought ways in which they could effectively deal with their troubled pasts; the role of transitional justice processes in international politics have grown ever since.

### **Political Transition without Transitional Justice: 'From Rhodesia to Zimbabwe'**

The increasing demand for transitional justice mechanisms throughout the second half of the 20<sup>th</sup> century is best illustrated by referring to a political transition which occurred without the assistance of these tools.

The story of present day Zimbabwe is a tale of widespread social unrest, economic deprivation and political instability. Today's news headlines are often dominated by stories discussing the frailty of Zimbabwe's weakening political coalition, growing concerns over the devastating impacts of her Cholera epidemics, and shocking hyper-inflation, unemployment and poverty statistics. But what are the reasons for such eventualities? How, in the space of 30 years, can a society go from being one of Africa's strongest economies, often labelled the 'breadbasket of Africa'<sup>18</sup> to a 'failed state'? By a 'failed state' we mean that

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<sup>18</sup> "Mugabe Attacks Enemies at Food Summit," (The Zimbabwe Times, November 18, 2009) Available at: [http://www.thezimbabwetimes.com/?p=25148&utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+TheZimbabweTimes+%28The+Zimbabwe+Times%29&utm\\_content=Yahoo%21+Mail](http://www.thezimbabwetimes.com/?p=25148&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+TheZimbabweTimes+%28The+Zimbabwe+Times%29&utm_content=Yahoo%21+Mail) (Last accessed June 22<sup>nd</sup> 2011).

the Zimbabwean government is “unwilling to protect its citizens from violence or perhaps even destruction,”<sup>19</sup> is unable to provide and maintain basic public services and is isolated from the international community. One answer is that Zimbabwe suffered and continues to suffer from the consequences of an unstable, and mismanaged political transition. This transition is briefly explored below, and will be more thoroughly addressed throughout Chapter 4 of this thesis.

During the days of colonial rule, Rhodesia, as it was formerly known, was seen to be one of Africa’s strongest economic nations and was even described by President Samora Machel of Mozambique as the ‘jewel of Africa.’<sup>20</sup> Despite its economic strengths, as was a common characteristic of most colonial nations, the vast majority of the nation’s population was not fairly represented by the political system in place; Rhodesia’s 1961 Constitution gave roughly 95% of the vote to the educated and wealthy sectors of society, namely the white population.<sup>21</sup> The fact that the white populace contributed to below 5% of the overall population is an illustration of the inequality and underrepresentation that was promoted by Ian Smith’s colonial government. Such oppressive policies would surely have long-term repercussions.

These repercussions came in the form of the ‘The Bush War,’ fought between the Black Nationalist parties; The Zimbabwean African National Union (ZANU) and The Zimbabwean African People’s Union (ZAPU) and the predominantly white, Rhodesian Army. Despite being heavily outnumbered, the Rhodesian army, thanks to superior technology and initial overseas support, managed to hold off the nationalist threat. Although, as the war dragged on, the government’s position became increasingly weakened, their resistance to majority rule finally broke in 1979, upon the signing of the Lancaster House Agreement.<sup>22</sup> Though the agreement itself paved the way for political transition to majority rule, its clumsy structure and inability to deal with transitional problems such a land inequality issues and uneven political representation, played a key role in Zimbabwe’s rapid decline.

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<sup>19</sup> For a more comprehensive definition of a failed state see: Chomsky, Noam: “Superpower and Failed States,” (*Khaleej Times*, April 5<sup>th</sup> 2006). Available at <http://www.chomsky.info/articles/20060405.htm> (Last accessed June 7th, 2011).

<sup>20</sup> “The Jewel of Africa,” (*The Insider*, April, 2003) Available at: <http://www.insiderzim.com/ap03guest.html> (Last viewed June 22nd 2011).

<sup>21</sup> “The 1961 Constitution: Legislative Assembly of Southern Rhodesia,” (*Parliament of Zimbabwe*) Available at: <http://www.parl.zim.gov.zw/inside.aspx?mpgid=3&spid=16> (last viewed June 22<sup>nd</sup> 2011).

<sup>22</sup> “The Lancaster House Agreement,” Available at: <http://home.wanadoo.nl.rhodesia/lanc1.html> (last viewed June 22nd 2011).



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Despite talk of reconciliation and reintegration, following the 1980 elections, the newly elected PM of Zimbabwe, Robert Mugabe, soon began a process of oppression and intimidation against his former enemies and political opponents. The ruling ZANU government also sought to manipulate the political system to increase its hold over Zimbabwean society. Mugabe's men also sought to gain economic dominance by throwing white land owners off of their lands. This policy was legally endorsed by the 'Land Acquisition Act' which was introduced in 1992, and hastened by Mugabe's 2000 'fast track' policy;<sup>23</sup> this course of action not only left many former-landowners homeless, but also severely damaged the nation's ability to feed itself.

When accounting for this failed transition, as well as assessing the responsibility of Mugabe and his co-conspirators, Chapter 5 of this thesis also places much blame upon the inadequacies of the Lancaster Agreement and its failure to address key political and economic inequalities, such as the imbalance of land ownership and political representation, as Eddy Cross, policy director of the Movement for Democratic Change argued: "At Lancaster House we made further mistakes, imposing on Zimbabwe a British style of constitution and failing to consult the majority."<sup>24</sup> The fact that 1% of the population maintained ownership of 70% of the land and the fact that as part of the Lancaster Agreement, the white community would maintain 20 parliamentary seats until 1987, could only have served to increase the resentment of the black population.<sup>25</sup> Such imbalances should have been addressed prior to the signing of the agreement.

The Zimbabwean example demonstrates the importance of addressing political, social and economic tensions present at the point of the transition; had a transitional justice mechanism, such as a truth commission been employed during the negotiation process of the Lancaster Agreement, these tensions could have been addressed and Mugabe's government might not have felt so inclined to avenge political, social and economic imbalances of the past. Such a body may well have taken the necessary steps to reconcile Zimbabwe's opposing political

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<sup>23</sup> Cross, Eddy: "Where Did We Go Wrong?" (The Zimbabwe Times, July 12, 2009) Available at: [http://www.thezimbabwetimes.com/?p=25148&utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+TheZimbabweTimes+%28The+Zimbabwe+Times%29&utm\\_content=Yahoo%21+Mail](http://www.thezimbabwetimes.com/?p=25148&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+TheZimbabweTimes+%28The+Zimbabwe+Times%29&utm_content=Yahoo%21+Mail) (Last viewed June 22<sup>nd</sup> 2011).

<sup>24</sup> Cross, Eddy: "Where Did We Go Wrong?" (The Zimbabwe Times, July 12, 2009) Available at: [http://www.thezimbabwetimes.com/?p=25148&utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+TheZimbabweTimes+%28The+Zimbabwe+Times%29&utm\\_content=Yahoo%21+Mail](http://www.thezimbabwetimes.com/?p=25148&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+TheZimbabweTimes+%28The+Zimbabwe+Times%29&utm_content=Yahoo%21+Mail) (Last viewed June 22<sup>nd</sup> 2011).

<sup>25</sup> "The Lancaster House Agreement," Available at: <http://home.wanadoo.nl.rhodesia/lanc1.html> (last viewed June 22<sup>nd</sup> 2011).

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forces and reform her political and economic system to better represent and serve the people of Zimbabwe.

Chapter 5 of this thesis will seek to develop a truth commission framework which could be employed in Zimbabwe following the cessation of Mugabe's regime. It is hoped that this commission will be able to succeed where the Lancaster Agreement failed and address long-term political and social tensions, in order to prevent further conflict and assist the establishment of a peaceful, democratic Zimbabwe.

### **The Five Mechanisms of Transitional Justice**

Having introduced transitional justice theory, the conditions within which its processes operate, and the consequences of political transitions occurring without these tools, it is now necessary to look at the specific mechanisms which enact these processes:

#### **1. Prosecutions**

Criminal prosecutions perform a critical role in response to human rights violations. They can take place in a wide range of formats from criminal, civil, national, international, foreign or domestic prosecutions. Although in an ideal world, post-conflict states would carry out domestic trials which would lessen their reliance upon international assistance, this is often not possible when national and civil court infrastructures are damaged by conflict, restrained by economic limitations or hampered by corruption or bias. As a consequence, states are often dependent upon international criminal prosecution processes such as the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Prosecutions have a substantial impact upon transitional societies in a number of ways. Primarily, they promote accountability by prosecuting individuals and groups guilty of committing human rights violations; such a process can help terminate long periods of impunity and set a precedent which will act as a deterrent against future crimes. Criminal trials also provide redress for the victims of these violations, which may eliminate the need to orchestrate personal retribution and may prevent future resentment against the state. In addition to assisting with the removal of criminal parties from society, prosecutions also help reinforce the rule of law and develop a culture which respects and

protects the human rights of its citizens. Each of these factors is essential when rehabilitating post-conflict societies as Hayner and Freeman testify: “The importance of criminal trials remains unrivalled. No other mechanism is perceived to have a greater impact on specific and general deterrence, public confidence in the state’s ability and willingness to enforce law, and a victim’s sense of justice.”<sup>26</sup>

## **2. Truth Commissions**

Truth Commissions are established to investigate and create formal accounts of past human rights violations. Their specific characteristics will be explored shortly.

## **3. Reparations**

Reparations can also serve as an integral part of transitional justice processes. Their main function is to compensate victims of past human rights violations for the unwarranted persecution they have previously endured, by providing them with monetary compensation which is designed to assist them when dealing with the consequences of their abuse e.g. paying for medical assistance, the recovery of possessions or property etc. Reparations can be provided to victims in the form of basic services or guarantees to assist their future rehabilitation and development. Additionally, reparations can take the form of symbolic gestures such as public apologies or the creation of memorials to provide further acknowledgement of the occurrence of past atrocities. Each of these practices can assist the healing process of victims and fractured societies.

Despite the positive impacts which they can make, it is often very difficult for transitional and post-conflict societies to budget for extensive reparations programmes. Chapter 2 provides evidence of the failure of governments to live up to reparations commitments for this very reason.

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<sup>26</sup> Freeman, Mark: “Truth Commissions and Procedural Fairness,” (Cambridge: Cambridge University Press, 2006) p10.

#### 4. Institutional Reform

“Institutional reform is the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents.”<sup>27</sup>

A critical part of the transition process from an authoritarian regime to a democracy is the removal and reformation of state structures which once promoted and enforced oppression and the systematic violation of human rights. Effective reforms ensure that these institutions are redesigned to act on behalf of their citizens and protect their basic human rights and the rule of law.

As well as the restructuring of institutions, such as the state’s constitution, laws, legal systems, education systems, armed forces etc., institutional reform policies can also include a comprehensive vetting process. This involves the banning of members of past authoritarian regimes and those responsible for the orchestration of human rights, from retaining public office and other positions of influence. In the long-term, this might well repair damaged relations and trust between a state and its citizens.

#### 5. Amnesties

Transitional justice processes can also involve the granting of amnesties to guilty parties. Although many take a dim view of such policies (see retributive v restorative justice discussion), arguing that they only serve to encourage the growth of impunity within transitional societies; they do so from a narrow-minded perspective. Though this debate is looked at in more detail throughout the justice section of this chapter, it is important to note that whilst the granting of blanket amnesties may be considered unjust and a threat to accountability processes, conditional amnesties working alongside other transitional justice mechanisms can have the opposite effect. Recent analysis supports the viewpoint that when working alongside criminal justice processes, conditional amnesties can indeed strengthen democracy and promote the protection of human rights.<sup>28</sup>

It should be noted that the five mechanisms introduced here are often interdependent and can work alongside each other to promote transitional justice; for example, truth commission

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<sup>27</sup> “Institutional Reform,” (International Centre for Transitional Justice) Available at: <http://ictj.org/our-work/transitional-justice-issues/institutional-reform> (Last viewed January 12th 2012).

<sup>28</sup> Olsen et al: “Transitional Justice in Balance,” (Washington D.C: United States Institute of Peace Press, 2010) p147.

enquiries can pass on evidence gathered to assist with trials and judicial proceedings. In a similar way, if effectively introduced, reforms to a state's judicial infrastructure can significantly improve the impartiality and effectiveness of domestic criminal prosecutions. When looking at the impact of transitional justice mechanisms in recent history, Olsen et al determine that transitional justice mechanisms have the greatest impact when they work together: "Two important goals for transitional justice policy are to strengthen democracy and to reduce human rights violations. The empirical analysis suggests that the best method for achieving these two goals is via multiple mechanisms: trials and amnesties, or trials, amnesties and truth commissions."<sup>29</sup>

The involvement of each of these mechanisms within the transition process will vary depending upon the individual circumstances faced by the society in question and the availability of resources. As Hayner states, the varying circumstances faced by states mean that their overall objectives often differ significantly: "A state may have a number of objectives in responding to past abuses: to punish perpetrators; establish the truth; repair or address damages; pay respect to victims and prevent further abuses. There may be other aims as well such as promoting national reconciliation and reducing conflict over the past, or highlighting the new government's concern for human rights and therefore gaining the favour of the international community."<sup>30</sup> Inevitably the degree of involvement of the five mechanisms of transitional justice will also heavily depend on the resources available at the point of transition; 'holistic transitional justice strategies'<sup>31</sup> can be hampered by damaged economies or corrupted state infrastructures. Chapter 3 provides a comprehensive breakdown of the political, economic and social assessments required prior to the application of holistic transitional justice approaches.

It should also be emphasised that although the evidence suggests that holistic approaches to transitional justice practices are often more effective, the circumstances faced by transitional states often mean that this approach is not only implausible but sometimes unnecessary. Localised human rights abuses for example, can often be dealt with through the implementation of concentrated regional initiatives involving a minority of these transitional

<sup>29</sup> Olsen et al: "Transitional Justice in Balance," (Washington D.C: United States Institute of Peace Press, 2010) p159.

<sup>30</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p11.

<sup>31</sup> A 'holistic transitional justice strategy' is a method of dealing with gross violations of human rights using a combination of many if not all transitional justice practices (see: Olsen et al: "Transitional Justice in Balance," (Washington D.C: United States Institute of Peace Press, 2010) p24.

justice tools; a clear differentiation between localised and systematic human rights violations must be made when assessing whether or not a holistic approach is required.

Furthermore, the effectiveness of these mechanisms will be heavily dependent on the nature of the political transition through which the state in question had passed. As will be further discussed when developing prospective truth commission frameworks in Chapter 3, the nature of the transition in question will dictate the degree of authority and freedom possessed by the newly instituted government and any transitional justice mechanism which they introduce. The nature of the transition thus dictates the chances of success of the transitional justice mechanism/s established. The progress made by societies whose governments remain heavily influenced or controlled by previous power groups, is often severely hindered: "The need of victims and the society as a whole to heal from the wounds inflicted upon them by the former regime often has to be balanced against the political reality in which the new government may have limited political power, and in which it may have inherited a political state."<sup>32</sup> An example of this can be seen by referring to the political transitions which occurred in Chile and El Salvador: "The modes of transition used in Chile and El Salvador allowed authoritarian actors to impose significant enclaves on the transitional polities of both countries."<sup>33</sup> Because of the nature of the political transitions in these states (political reform/compromise), those responsible for past atrocities maintained significant degrees of political influence. This meant that they were able exert influence upon the transitional justice processes enacted in their countries, to ensure that their involvement would not be investigated. It is therefore important to note that the progression of transitional justice mechanisms may be blighted by the political contexts which result from the characteristics of the political transition through which a state has passed.

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<sup>32</sup> Sarkin, Jeremy: "The Tension between Justice and Reconciliation in Rwanda," (*Journal of African Law*: Vol.45, No.2, 2001) p143.

<sup>33</sup> Gairdner, David: "The Role of truth commissions in political Transition in Chile and El Salvador," (*Chr. Michelsen Institute, Development Studies and human rights*, R 1998: 8) p32.

## The 'Truth Commission'

"Truth commissions have come to be seen as valuable tools to balance demands for accountability for past human rights abuses with the fact that perpetrators often retain some influence over the course of the transition."<sup>34</sup>

Of all the transitional justice mechanisms and practices introduced here, this thesis will focus primarily upon the work of truth commissions and the impact they can have through the implementation of transitional justice practices throughout transitional and post-conflict societies.

This specific mechanism has been selected above others because of its adaptability, which allows it to operate within societies with varying political, social and economic contexts; this is reflected by its increasing popularity as a response to the gross violations of human rights in recent years: "Truth commissions have become a staple of post-conflict peacebuilding."<sup>35</sup>

In addition, the truth commission is a mechanism which best incorporates most of the transitional justice processes discussed throughout the opening stages of this thesis; with the exception of trials and criminal prosecutions. This allows them to "necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law."<sup>36</sup>

Truth commissions are also mechanisms which are able to work effectively in conjunction with other bodies, such as criminal prosecutions. There is much evidence to suggest that this 'holistic approach' can prove highly effective when investigating human rights violations in post-conflict societies: "Truth commissions work better when they complement the full exercise of victims' rights to pursue criminal justice and reparations rather than serve as a substitute for those rights."<sup>37</sup>

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<sup>34</sup> Brahm, Eric: "Uncovering the Truth: Examining Truth Commissions Success and Impact," (*International Studies Perspectives*, (2007) 8) p17.

<sup>35</sup> Brahm, Eric: "Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy," (Oxon: Routledge, 2010) p129.

<sup>36</sup> Annan, Kofi: "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General," (*United Nations Security Council*: 23<sup>rd</sup> August 2004) p9.

<sup>37</sup> "Truth Commissions," (*International Centre for Transitional Justice*) Available at: <http://ictj.org/sites/default/files/ICTJ-Global-Truth-Commissions-2008-English.pdf> (Last accessed: 16<sup>th</sup> January 2012).

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Truth commission advocates would argue that out of the approaches available, truth commissions are most effective at strengthening transitional democracies and promoting human rights values. These claims have been highly disputed in recent investigations.<sup>38</sup> The unfavourable results produced by recent analyses gauging the success rate of recent truth commission investigations demonstrates the need to provide better guidance to governments considering the adoption of these tools. This particular argument will be demonstrated throughout this thesis.

The decision to select truth commissions above other transitional justice mechanisms, as a point of focus throughout this thesis, is further justified by a comprehensive definition of these structures and what they can achieve.

### **Defining a 'Truth Commission'**

"A truth commission is an ad hoc, autonomous and victim-centred commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principle causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during the determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention."<sup>39</sup> The above definition, cited in Mark Freeman's *'Truth Commissions and Procedural Fairness,'* best defines the overall concept of 'the truth commission.' Freeman introduces several important characteristics here which are vital to both the success of the truth commission and to the overall concept of transitional justice.

Primarily, he states that truth commissions are 'victim-centred' bodies. This is of particular significance as it is the key distinction between truth commissions and criminal justice systems; whereas criminal justice mechanisms operate on behalf of the state, to adjudicate the crimes of individuals, truth commissions act on behalf of the victims themselves. In doing so they address many key issues, often omitted by judicial hearings: "Peace and stability can only prevail if the population perceives that politically charged issues, such as ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of

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<sup>38</sup> See: Thoms, Oskar et al: "State-Level Effects of Transitional Justice: What do we Know?" (*The International Journal of Transitional Justice*, 2010, 1-26).

<sup>39</sup> Freeman, Mark: "Truth Commissions and Procedural Fairness," (Cambridge: Cambridge University Press, 2006) p18.



the right to property or citizenship and territorial disputes between states, can be addressed in a legitimate and fair manner.”<sup>40</sup> Therefore, by acting on behalf of the victims themselves, truth commissions provide reassurance to these individuals that their suffering will be investigated and acknowledged by a state-endorsed institution. Although victims often feel that justice can only be served by criminal convictions, such a process omits some forces which are fundamental to the development of forgiveness and reconciliation processes. In other words, whilst judicial trails aim to convict guilty parties who are in violation of state laws, they often fail to reconcile fractured societies or compensate victims. These inadequacies will be further examined later in this chapter when we introduce the ‘restorative v retributive’ debate.

The second characteristic introduced by Freeman and discussed here by Eric Brahm, describes truth commissions as bodies which are established and endorsed by the state: “Truth commissions are officially sanctioned, authorized, or empowered by the state. This, in principle, allows the commission to have greater access to information, greater security, and increased assurance that its findings will be taken under serious consideration.”<sup>41</sup> Brahm describes here the advantages of truth commissions being ‘officially sanctioned’ by the state. The words ‘in principle’ here reflect the reality that this support is not always forthcoming; as this thesis argues, this is heavily dependent on the state’s political characteristics which often result from the type of political transition which has occurred. It should also be stressed that, despite their ties with governments, truth commissions, in principle, remain independent bodies acting without influence from the state. This is also heavily dependent on the aforementioned factors; evidence presented in Chapter 2 demonstrates that there have been occasions in the past where governments have sought to influence or manipulate the work of truth commission enquiries.

Thirdly, Freeman’s definition states that truth commissions ‘investigate and report on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression.’ This clearly differentiates them from judicial processes whose main purpose is to investigate and adjudicate on specific events. The periods of time investigated by commissions are usually established in their mandates, and can sometimes span back as far as a few decades or more. These mandates perform a critical task in setting out the overall

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<sup>40</sup> Annan, Kofi: “Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies,” (U.N. Doc. S/2004/616, August 23, 2004) p4.

<sup>41</sup> Brahm, Eric: “What is a Truth Commission?” Available at: [www.beyondintractability.org/essay/truth\\_commissions](http://www.beyondintractability.org/essay/truth_commissions) (last accessed June 22nd 2011).

parameters of the commission's investigation. This is essential as it ensures that commission enquiries are refined and focused on achieving specific objectives: "The mandate and the powers bestowed on a truth commission are crucial in determining the impact the commission is able to have on reconciliation... how long the commission will be working... what violations are under investigation and what powers the commission has."<sup>42</sup> The investigative nature of truth commissions allows them to evaluate the causes and consequences of atrocities; this is essential when seeking to prevent the repetition of past atrocities.

The final point in Freeman's definition states that truth commissions attempt to prevent the repetition of past atrocities through the publication of recommendations in the form of a post-investigatory report. This is one of the most important functions of the commission. The report published by the commission can highlight its key findings; outline patterns of abuse; and most importantly create a set of recommendations advising upon various societal reforms which will ensure that past atrocities are not repeated. These reforms, if implemented, often assist societies with the transition process: "Commissions can identify and recommend specific legal and institutional reforms that will enable the country to achieve long-term social, economic and political objectives that are essential to achieving a better future."<sup>43</sup> These reports can also advise on various forms of reparation which can be provided to compensate victims. It is therefore essential that these reports are widely distributed and that the reforms included within them are seriously considered by the governments to which they are recommended. In past years the impacts of truth commissions have been severely hampered by the unwillingness of governments to observe and implement the recommendations and reforms published within their final reports. Again, this is heavily reliant upon the political stance of the government and the nature of the transition which precedes the commission's introduction.

The lack of powers of prosecution granted to truth commission investigations is one important characteristic not covered by Freeman's definition. Kerr and Mobekk state that "a truth commission cannot determine culpability of the individual, and it cannot punish or

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<sup>42</sup> Kerr, Rachel and Mobekk, Eirin: "Peace and Justice: Seeking Accountability after War," (Cambridge: Polity Press, 2007) p131/2.

<sup>43</sup> Freeman, Mark and Hayner, Priscilla B: "Truth-Telling" (Taken from: David Bloomfield and Teresa Barnes: "Reconciliation after Violent Conflict: A Handbook," (Stockholm: International Institute for Democracy and Electoral Assistance, 2005)) p126.

sanction perpetrators of human rights abuses.”<sup>44</sup> For this reason, truth commissions are granted relative freedom when constructing their mandates and conducting their investigations. However, this characteristic has been stretched somewhat in recent years, particularly since the establishment of the South African Truth and Reconciliation Commission which was granted the authority to award amnesty to individuals who disclosed information about past events. Although its mandate did not grant it the power of prosecution, the inclusion of the power to grant amnesty should be seen as a significant development in the evolutionary process of truth commission mandates. Such a power could directly clash with judicial authorities and should only be implemented after serious consideration by the relevant authorities.

In general though, truth commissions operate as investigatory bodies only. This characteristic enables them to form more comprehensive investigations as perpetrators are more willing to assist them with their enquiries, without fear of punishment. Truth commissions also often have better access to evidence; those under investigation are more likely to co-operate knowing that they are unlikely to face criminal prosecutions charges. The absence of this threat encourages a greater participation of both perpetrators and victims.

Despite their inability to prosecute, truth commissions can promote accountability and can assist criminal prosecutions by working in conjunction with judicial bodies. The South African Truth and Reconciliation Commission demonstrated this when hearing the case of Colonel Eugene De Kock. The testimony of Colonel De Kock, Commander of the C1 Unit of the South African Police Counter-Insurgency Group, represents one of the main success stories of the TRC. As part of an amnesty plea De Kock disclosed the truth regarding past human rights violations and even linked two former presidents to these criminal acts.<sup>45</sup> He was later denied amnesty by the commission, because the TRC decided that he had failed to provide a political motive for his actions;<sup>46</sup> amnesty applications were only successful if guilty parties could prove that their actions were politically motivated. Some of the evidence he provided was passed on to a criminal court and he was sentenced to 212 years imprisonment in August 1996. This demonstrates the ability of these truth seeking bodies to establish a comprehensive account of past events and to pass on evidence to judicial bodies.

<sup>44</sup> Kerr, Rachel and Mobekk, Eirin: “Peace and Justice: Seeking Accountability after War,” (Cambridge: Polity Press, 2007) p130.

<sup>45</sup> “Truth and Reconciliation of South Africa Report,” (Volume 6) Available at: <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> (Last accessed June 22nd 2011).

<sup>46</sup> “Apartheid Death Squad Boss Denied Amnesty,” (BBC Online News: December 14, 1999) Available at: <http://news.bbc.co.uk/1/hi/world/africa/564442.stm> (Last accessed June 22nd 2011).

Sadly for the TRC, the case of Eugene De Kock was one of very few successful convictions secured using evidence gathered by the commission.

Another significant truth commission characteristic is the temporary nature of a commission's investigation process – in general truth commissions only operate for short periods of time, from 6 months to 2 years, though more recent commissions have operated for extended durations. This is of course dependent upon the nature and scale of the investigation and the investigatory techniques employed by the specific commission. It is important that truth commissions do not conduct prolonged investigations; the longer they take the less reliable their sources will become, the less support they will receive and the overall impact of their final report will diminish. The investigation of the Ugandan Truth Commission for example, extended for a prolonged period of time, and submitted its report nearly a decade after its initial establishment, due to funding shortages; because of its reliance upon international donors, commissioners had to work part-time which further drew out proceedings. By the time it was published, the commission's report was all but ineffective. The temporary nature of a commission ensures that it carries out its investigation quickly and efficiently. This case is examined alongside others throughout Chapter 2 of this thesis.

The final characteristic omitted from Freeman's description regards the timing of the establishment of these commissions. Truth commissions are established during periods of political transition, and often after conflict; one of their main goals is to assist with this transition process: "Most of these commissions were created to be a central component to a transition from one government to another or from civil war to peace."<sup>47</sup>

The differing characteristics of truth commissions demonstrate their ability to use a number of different techniques to address political, social and economic problems faced by states undergoing political transitions. In order to comprehend the full extent of the support offered by these bodies, it is necessary to analyse in detail exactly what truth commissions can achieve when operating to their full potential.

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<sup>47</sup>Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p17.

## What can a Truth Commission Achieve?

Despite the apparent diversity of truth commission investigations, due to the differing political, social and economic conditions they encounter, their core objectives can be narrowed down to three specific categories: their ability to disclose the truth over past events; their ability to cultivate and assist reconciliation processes; and their ability to promote restorative justice. Each of these objectives and outcomes are given due consideration below:

### A. Establishing the Truth

“We kid ourselves if we say bygones are going to be bygones. The past remains and unless you... look the beast in the eye, the beast is going to come back to haunt you.”<sup>48</sup>

Investigating and disclosing the full truth behind past events, is without doubt one of the main objectives and targeted outcomes of truth commission bodies: “Truth commissions thus seek... to uncover the past in order to answer questions that remain unanswered: What happens to husbands, sons, wives, and lovers at the hands of the ousted regime? Who gave the orders? Who executed the orders? What was the grand design? Who benefitted? Getting the facts provides closure, at least in theory.”<sup>49</sup> Here Rotberg introduces examples of some of the many questions which truth commission investigations seek to answer when developing a full account of past events. This is considered an imperative part of transitional justice; it is widely believed that for reconciliation processes to develop, establishing the truth about past events is essential: “If societies are to prevent recurrences of past atrocities and to cleanse themselves of the corrosive enduring effects of massive injuries to individuals and whole groups, societies must understand - at the deepest levels – what occurred and why.”<sup>50</sup> However, reconciliation is an extremely complex concept; there exists much debate surrounding the factors which both encourage and thwart the development of this process. It is commonly argued that truth-seeking can act as a catalyst for reconciliation processes; at the same time intensive truth-seeking processes can also damage more fragile societies.

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<sup>48</sup> Tutu, Desmond: “Confronting the Truth: Truth Commissions and Societies in Transition (DVD),” (York Zimmerman Inc, EAN: 718122409021, July 15<sup>th</sup> 2007).

<sup>49</sup> Rotberg, Robert I: “Truth v. Justice: The Morality of Truth Commissions,” (Oxford: Princetown Uni Press, 2000) p3.

<sup>50</sup> Rotberg, Robert I: “Truth v. Justice: The Morality of Truth Commissions,” (Oxford: Princetown Uni Press, 2000) p3.

Inevitably, the impact of such a process will depend upon the characteristics of the society in question.

### **The Different Levels of Truth**

“The commissioners should pay particular attention to the different levels of truth, while underlining the very subjective element in narrative truths. Importantly, regardless of the complexities of the concept, the fact remains that when such truths have been voiced they can no longer be denied, which may lay the foundation for a process of reconciliation.”<sup>51</sup>

According to Kerr and Mobekk in their recent publication: *‘Peace and Justice: Seeking Accountability after War,’* most truth commissions underestimate the complexities of truth-seeking processes. It is claimed here that their investigations are hampered by a misunderstanding of the differing origins of the evidence they gather; this can jeopardise the overall reliability of the truths they present in their final reports and can have a negative impact upon the potential reconciliation processes they seek to foster.

Kerr and Mobekk argue that there are three levels of truth which are commonly unearthed by truth commission investigations.<sup>52</sup> These are as follows:

1. Factual/forensic truth – Factual truth stems from the provision of empirical evidence and details which are indisputable; this evidence is presented as it is found, objectively and without interpretation or bias, e.g. figures regarding the numbers of those injured or killed by during specific atrocities. In a similar way, forensic truths come from the provision of indisputable information obtained by scientific methods such as ballistics, blood tests, DNA tests etc. Although the gathering of such evidence can prove costly both in terms of time and expenditure, it is the most reliable and valuable in any investigation.

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<sup>51</sup> Kerr, Rachel and Mobekk, Eirin: “Peace and Justice: Seeking Accountability after War,” (Cambridge: Polity Press, 2007) p134.

<sup>52</sup> Kerr, Rachel and Mobekk, Eirin: “Peace and Justice: Seeking Accountability after War,” (Cambridge: Polity Press, 2007) p133.

It should be noted that although factual/forensic truths can be regarded as objective evidence, potential bias can be shown in the selectivity of such findings; specific evidence may be selected or ignored depending on the case being made.

2. Personal/normative/narrative – This form of truth is based on personal accounts and is subjective in form. This is significant as it means that the account will be influenced by the person's own opinions or experiences. For example, if you interview an Apartheid policeman, and a member of the ANC about a specific event, there is a good chance that their accounts will differ due to their individual political standings and their own personal feelings towards the morality of the Apartheid system. As a result it is less reliable than factual truth. In addition, these testimonies often become distorted as the margin of time between when the crime is committed and when the testimony is taken increases. Truth commissions are often more reliant upon this form of the truth if they have limited authority, or if factual/forensic truth is lacking. However, this form of evidence can be extremely useful when gauging how a truth commission report will be received by its audience.
  
3. Dialogue truth – This form of truth can be derived from discussion between victims and perpetrators. Although useful, it can be difficult to obtain, and as the authors state, can often fail to establish the reasoning behind past occurrences. Although also subjective in format, as individuals share their own personal experiences, the opening up of a dialogue between victims and perpetrators can increase the onset of empathy and possible micro-level reconciliation processes between these groups. South Africa's TRC court-style public hearings sought to encourage the development of dialogue truths. This thesis endorses the establishment of local-level reconciliation workshops by civil society groups which encourage open dialogue communication between previously divided groups; this ensures that the commission's investigation will actively involve its intended audience.

One form of truth which can be encountered by truth commission investigations and is not mentioned by Kerr and Mobbek is 'reparational truth.' This should be considered a negative product of truth commission investigations and occurs when victims exaggerate accounts in order to qualify for greater compensation. Commission staff must be aware of this possibility when offering compensation to victims, particularly when reparations payments are defined by the extremity of the violations incurred.

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It is essential to categorise the different aspects of truth, as each carries differing levels of validity and reliability. Each level of truth contributes to an investigation in differing ways; whereas objective truths greatly assist the publication of impartial reports, subjective truths are essential when gauging the impact of incidents upon different identity groups within a society. It is essential that truth commissions appreciate the complexity of these different aspects of the truth when deciding upon the type of report they wish to publish. This leads us to the important question of what types of truths truth commissions should seek to include within their reports?

### **Which Truths do Truth Commission Reports Seek to Present?**

An understanding of the three types of truths presented by Kerr and Mobekk is inconsequential unless truth commission architects establish exactly which truths they wish to present and how they wish to present them, in their final reports. Although most truth commission investigations share similar titles and appear to have similar goals, the ways in which they present these truths are often fundamentally different, depending on the ambitions of the commission's architect and the requirements of the state.

Throughout "*The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*," Paul Gready argues that most modern day truth commissions are undermined by genre confusion. By 'genre,' Gready refers to the "language use in a conventionalized communicative setting in order to give expression to a specific set of communicative goals of a disciplinary or social institution."<sup>53</sup> In other words, the way in which the results of a truth commission report are gathered and communicated will be dictated by the 'genre' or communicative approach chosen by those in charge of the process.

In this way, Gready argues that truth commission investigations and reports are forged by the degree of emphasis placed on the following three approaches:

1. State Enquiry – This specific genre suggests that commission investigations will be orchestrated according to the needs of the state, e.g. to enhance state legitimacy, form a break from the past, fulfil social repair etc. In this instance, the state can use the

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<sup>53</sup> Gready, Paul: "*The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*," (Oxon: Routledge, 2011) p28.



commission to influence a political transition. Gready uses the example of South Africa's TRC which was used to prioritise a process of reconciliation.

2. Human Rights Report – This specific approach presents the information gathered concerning human rights abuses without interpretation but simply as information; it does not concern itself with the impact this information will have upon, or the way it will be perceived by the different identity groups from within its society.
3. Official State History – This final genre seeks to use evidence gathered to form an undisputed 'official state history' which can be used to rewrite a specific societies history books: "official histories, in short, rewrite the past, draw a line under the past, create a moral community/nation, and provide a foundation for the future."<sup>54</sup> Concerns have been voiced over impartiality of this approach; as Gready suggests, official histories can often become 'victors' histories,' where the state can seek to pursue one specific interpretation of the past.

Gready's analysis of the three genres provides an insight into the choices which must be made by truth commission architects when deciding upon the specific approach of their commission's investigation and the outlook of its final report. By 'genre confusion' Gready argues that truth commissions often 'render multiple genres' which end up being 'mutually undermining,' rather than complimentary; commission architects must be clear on the degree of emphasis they place on each genre to ensure compatibility. These choices are critical; they dictate not only the impartiality and legitimacy of the final report, but also its impact upon its intended audience. These decisions will also influence the structure of the commission's mandate.

### **The Role of a Truth Commission's Mandate**

A truth commission's mandate sets out a framework which governs how its investigation should be coordinated. The mandate also establishes boundaries which control the investigative freedoms of the commission; these boundaries are usually set up by the state or body which founded the commission or by the commission's chairperson. Much debate surrounds the benefits and disadvantages of flexible or inflexible mandates.

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<sup>54</sup> Gready, Paul: "The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond," (Oxon: Routledge, 2011) p45.

Priscilla Hayner argues that the broader the mandate the better for a commission as it will allow the commissioners to carry out more thorough and unrestricted investigations: “As a general rule, terms of reference should be sufficiently broad and flexible to allow investigation into all forms of rights’ abuses, leaving the commission the decision of what specific cases or practices to investigate or report.”<sup>55</sup> And indeed, it is often the case that commission mandates are purposefully left broad and flexible to grant commission staff the freedom to determine the direction and scope of their own investigations.

However, it could also be argued that the more investigative freedom granted to commissions, the more likely it is that they will lose focus and try to investigate too many cases over too broad a period of time; given the vast periods of time during which some atrocities are carried out by former regimes, with a broad mandate, this is a distinct possibility. Rwanda’s ‘National Unity and Reconciliation Commission’ suffered from this flaw. The freedom granted to it by its mandate meant that it lost its investigative focus and attempted to cover more cases than it could manage, given the limited time and resources available to it. Further examples of this are presented throughout Chapter 2.

The most effective commissions investigate cases which can be considered as adequate representations of all the atrocities which were carried out. Once effectively investigated, these cases will then hopefully provide commissions with an overall assessment of “the causes and consequences of broad and relatively recent patterns of severe violence or repression”.<sup>56</sup> In an ideal world truth commissions would investigate every case in which human rights violations occurred. Given the limited resources, funding and time available to commissions this is seldom possible. A more focused mandate will encourage truth commissions to concentrate on specific cases/events which will help them narrow down their investigations, without leaving any hidden truths. Argentina’s ‘National Commission on the Disappearance of Persons’ was commended for achieving this.

However the pitfalls of placing such restrictions on commission mandates are also clear. Such an approach may limit the investigative potential of a commission and its staff; commissions with well-qualified and influential staff may seek to alter the direction of their investigations to maximise their findings; this potential is prevented by rigid mandates. Unwarranted

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<sup>55</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p73.

<sup>56</sup> Freeman, Mark: “Truth Commissions and Procedural Fairness,” (Cambridge: Cambridge University Press, 2006) p18.

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restrictions may also limit the scope of a commission's investigation to prevent the incrimination of specific groups; provided that the commission's staff are both qualified and democratically elected, broad mandates encourage a more thorough and unadulterated process.

The specific mandate restrictions referred to here will be discussed when analysing the structures of truth commissions in Chapter 4. As ever, the outcome of flexible or rigid mandate debate will depend on the resources available to the commission and the scale of the events under investigation; only once these variables have been assessed, can an ultimate decision be made.

The final point to make concerning truth commission mandates is that it is imperative that these mandates are not manipulated by the authorities of previous regimes in order to conceal specific truths. As will be explored in Chapter 4, when truth commissions are established, depending on the nature of the political transition which has occurred, often those responsible for the atrocities of previous regimes maintain influence within the new government/society. In these situations, the manipulation of commission mandates is a distinct possibility as they may not wish commissions to investigate particular periods of time when specific crimes were committed; as previously discussed, this can be prevented by maintaining broad commission mandates with limited restrictions. It is essential that truth commission architects are impartial and design truth commission mandates to establish the full truth concerning past atrocities without exception or hidden agenda: "The authority that establishes the mandate has a direct impact on a truth commissions perceived legitimacy."<sup>57</sup>

Disclosure of the full truth here includes revealing the truth behind atrocities committed by both victims and perpetrators. Truth commissions need to help societies understand that all human rights violations are wrong, not just violations committed by selected groups. This is particularly necessary when investigating civil wars: "After a civil war, investigating both sides can be critical to a commission's popular legitimacy, and important in contributing to national unity and reconciliation."<sup>58</sup> It is key to the preservation of the integrity of truth commissions that they are seen to be investigating the human rights abuses committed by all parties involved. As Martha Minow stresses, The South African Truth and Reconciliation

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<sup>57</sup> Freeman, Mark: "Truth Commissions and Procedural Fairness," (Cambridge: Cambridge University Press, 2006) p28.

<sup>58</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p75.

Commission was heavily criticised by former President De Klerk for its lack of investigation of the crimes committed by Winnie Mandela. As a result, he labelled the process a ‘witch hunt,’ and withdrew from the commission hearings.<sup>59</sup>

### **The Negative Impacts of the Truth**

All previous arguments have worked under the assumption that the full disclosure of the truth will help a society to reconcile and heal its wounds. However, it is also important to acknowledge that such an approach is not always appropriate. There are certain situations where investigating and unearthing the truth behind past atrocities can not only prevent reconciliation and healing, but can even cause societies considerable amounts of pain and suffering. As Hayner argues, this approach, in some situations, can result in the reopening of old wounds: “There has been no study to date of the psychological impact of truth commissions on survivors, but the evidence that is available is enough to raise some serious questions.”<sup>60</sup> She claims that there are a numerous ways in which truth-seeking bodies can damage rather than heal a society:

1. Forcing victims to revisit traumatic experiences – Some victims do not respond well to the revisiting of past atrocities. This is because in some cases the experiences of victims are so severe that the only way they can deal with them is by forgetting. Should they be forced to reopen these wounds, whether it be through public or private testimony, the consequences could be disastrous: “Victims and witnesses can in effect be re-traumatized by giving testimony to a commission, which may be so severe as to result in a multitude of debilitating symptoms, such as confusion, nightmares, exhaustion, loss of appetite, and sleepiness.”<sup>61</sup> It is therefore important that victims should be assessed on a case-by-case basis before they are encouraged to revisit past atrocities. Governments must not assume, as many wrongly do, that truth will lead to healing and reconciliation. In some cases the truth can be too painful and destructive for some victims to confront.

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<sup>59</sup> Minow, Martha: “Between Vengeance and Forgiveness,” (Boston: Beacon Press, 1998) p87.

<sup>60</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p135.

<sup>61</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p141.

2. Failure to provide the necessary psychological/emotional support – Another way, in which the truth can be damaging, is if victims are not provided with the necessary psychological and emotional support when revisiting traumatic experiences. This commonly occurs when truth commissions are underfunded and as a result fail to train their staff with the necessary skills to support witnesses during the testimony process: “Given the great number of victims that come forward and the short period of time that a commission has to complete its work, truth commissions to date have not been able to offer any serious psychological support services, nor generally respond well to the occasional follow-up phone calls of distress or requests for information on the progress of investigation on a particular case.”<sup>62</sup> Furthermore, Hayner adds that the truth-seeking process can also be damaging for the staff employed by commissions should they not be adequately trained. She calls this ‘secondary traumatisation’: “Staff are often not given many tools to process the pain and agony they hear on a daily basis.”<sup>63</sup> It is therefore essential that truth commissions provide the necessary support to victims and commission staff, if they are going to both cope with the revisiting of potentially traumatic experiences. This will be further explored in Chapter 2.
  
3. Stimulating revenge-seeking – Another possible consequence of truth-finding which was not touched on by Hayner, is the possibility that it can lead to victims seeking revenge upon their oppressors. The truth-seeking process can often uncover information that was previously unknown by victims. Upon hearing such information, rather than reconcile with the orchestrators of atrocities, in some cases angry victims may seek to avenge their friends or relatives by attacking their former oppressors. This should be seen as a natural human reaction and a real threat towards potential reconciliation processes. Governments should not assume that their citizens will be as forgiving as the people of South Africa were when truths were established by the South African Truth and Reconciliation Commission.

It is therefore essential that newly formed governments do not always assume that truth-seeking will contribute towards reconciliation and healing. As we have discussed, the truth can often have potentially damaging consequences which can prevent reconciliation and

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<sup>62</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p140.

<sup>63</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p150.

healing from taking place in unstable transitional societies: "A truth commission is a high-risk endeavour. For some societies, it is a risk best avoided."<sup>64</sup> It is equally important that international actors do not force societies to implement truth commissions under the same assumption: "Ultimately, the decision whether or not to institute broad truth-seeking should be made by the country itself."<sup>65</sup> This argument is supported by the cases of Mozambique and Cambodia.

The example of Mozambique presents us with a case study which suggests that in some instances it is better to leave the past alone and avoid the implementation of truth-seeking mechanisms. In this particular instance, gross human rights violations were committed by both the Mozambique government and the Renamo (rebel) forces, which devastated Mozambique's society. However, rather than establish a commission to investigate what happened and why, it was decided by the newly instituted government that it was within the interests of the people of Mozambique and the future prosperity of the nation, to overlook the past and focus on the future: "we will talk and we may govern, but we will not bring up the past."<sup>66</sup>

Though it is unclear whether in fact this policy was consented by the people of Mozambique, it was commonly believed that both sides were equally responsible for the crimes committed and shared equal guilt: "Since the two parties negotiating the peace accord were both responsible for abuses during the war, neither was much interested in airing their crimes in public or under the painful examining light of the negotiation table."<sup>67</sup> Though at the time this strategy roused much scepticism on the international circuit, this approach has proven to be effective in Mozambique. By overlooking the past and moving on without knowledge of the truth, victims learned to co-exist with perpetrators and peace was restored.

In such a situation though you have to wonder to what extent this was actually the will of the people? Throughout *'Democracy in Mozambique: The significance of multi-party elections,'* Graham Harrison suggests that elections were forced upon the people of Mozambique, and

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<sup>64</sup> Freeman, Mark: "Truth Commissions and Procedural Fairness," (Cambridge: Cambridge University Press, 2006) p37.

<sup>65</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p186.

<sup>66</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p191.

<sup>67</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p191.

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that they did not necessarily represent a significant movement towards reconciliation: “There is not necessarily a feeling of reconciliation or at least post-war stability that one would expect after a massive popular election.”<sup>68</sup> Be that as it may, it cannot be denied that Mozambique has successfully avoided a return to conflict since the peace agreements of the early 1990’s: “Today, the two main political parties - adversaries in war not that long ago - peacefully share power at the municipal level for the first time in history.”<sup>69</sup> As a result, the case of Mozambique supports the argument that in some cases, to achieve peace, it is best to leave the past alone.

## Conclusions

Each of the aforementioned arguments for and against the pursuit of the truth leads to one inevitable conclusion; when deciding whether or not to pursue the truth over past atrocities through the implementation of truth commissions, it is first necessary to understand the specific social and political context present within the society under consideration. It is only through recognising the specific social and political contexts of transitional states that we can determine whether or not truth-seeking bodies will assist or hinder reconciliation processes.

What cannot be denied is the impact that truth-seeking mechanisms have had and continue to have on societies in transition. This is particularly the case when the historical accounts formed by truth commissions are officially recognised: “Knowledge that is officially sanctioned and thereby made part of the ‘public cognitive scene’ ... acquires a mysterious quality that is not there when it is merely the ‘truth.’ Official acknowledgement at least begins to heal the wounds.”<sup>70</sup>

Investigating the truth behind gross human rights violations remains one of the central functions of ‘the truth commission’ and an integral part of reconciliation processes for states undergoing political transition.

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<sup>68</sup> Harrison, Graham: “Democracy in Mozambique: The significance of multi-party elections,” (*Review of African Political Economy*, Vol.23, No.67, March 1996) p31.

<sup>69</sup> “Strengthening Democracy in Mozambique,” (USAID: August 17, 2009) Available at: [http://www.usaid.gov/stories/mozambique/ss\\_mozambique\\_election.html](http://www.usaid.gov/stories/mozambique/ss_mozambique_election.html) (Last accessed June 22nd 2011).

<sup>70</sup> Mendez, Juan: Review of “A Miracle, and Universe,” by Lawrence Weschler, (*New York Law School Journal of Human Rights* 8, 1991) p8.

## **B. Reconciliation**

“It was Tutu who elicited its [reconciliation] meteoric crescendo... Tutu’s performance as the commission’s chairman delivered the concept its global fame. Reconciliation has subsequently become eponymous for truth commissions in Peru, East Timor, Sierra Leone, Nigeria, Liberia, Morocco and Chad.”<sup>71</sup>

Since the birth of the South African Truth and Reconciliation Commission, promoting reconciliation has become one of the primary objectives of most modern-day truth-seeking commissions. It is not uncommon when introducing the concept of a truth commission to someone for the first time, to be interrupted by the comment “don’t you mean truth and reconciliation commission?” This highlights a common misconception which believes that all modern-day truth commissions are designed and created for the sole purpose of promoting reconciliation. This is clearly not the case; there exists a diverse range of truth commissions, each with differing objectives and agendas. This does however demonstrate the increasing use of this concept in modern day international politics.

There also exists a lack of clarity over the definitive definition of reconciliation and its application: “What is reconciliation? How is reconciliation achieved? And under what conditions should it be sought? Curiously, given the frequency with which the term ‘reconciliation’ is used, no one is saying.”<sup>72</sup>

### **Defining Reconciliation**

In *‘Reconciliation after Violent Conflict: A Handbook,’* David Bloomfield defines reconciliation as: “An over-arching process which includes the search for truth, justice, forgiveness, healing and so on. At its simplest, it means finding a way to live alongside former enemies – not necessarily to love them, or forgive them, or forget the past in any way, but to co-exist with them, to develop the degree of cooperation necessary to share a society

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<sup>71</sup> Philpott, Daniel: “Religion, Reconciliation and Transitional Justice: The State of the Field,” (New York: SSRC Working Papers, October 17, 2007) p15.

<sup>72</sup> Dwyer, Susan: “Reconciliation for Realists,” (*Ethics and International Affairs*, Volume 13, Issue 1, March 1999) p81.



with them, so that we all have better lives together than we have had separately.”<sup>73</sup> This definition best defines the reconciliation which is fostered by truth commission investigations. It also addresses the complex relationship shared between truth, justice, forgiveness and healing. Each of these factors may or may not contribute towards a process of reconciliation; every transitional or post-conflict state will have differing circumstances to deal with when constructing their reconciliation programmes: “As every conflict is different, and every democratic settlement is different, so a reconciliation process will differ from all others in important respects, even as it shares many similarities with them.”<sup>74</sup>

The South African Truth and Reconciliation Commission for example benefitted from the belief in forgiveness, embedded in the Christian religion. Despite this, in the context of transitional justice, reconciliation, as stated in the above quotation, does not always require victims to forgive perpetrators; sometimes co-existence is all that is required. In these situations reconciliation requires victims and perpetrators to be able to leave peacefully together within one society; this can be seen as the ‘end-state’ which is pursued by most reconciliation processes. That being said, if achieved at some level, forgiveness can play a significant part in the reconciliation process and in the strengthening of previously polarised societies. The various conceptions of forgiveness will be discussed shortly, but are referred to here as a demonstration of the different roles which are likely to be played by truth, justice, forgiveness and healing in differing socio-political contexts.

### **Reconciliation: the ‘End Result’ and the ‘Process’**

In order to strengthen our understanding of this complex concept, it is necessary to further breakdown the concept of reconciliation. Firstly, as Bloomfield stresses, reconciliation should be considered as both ‘an end result’ and ‘a process’.<sup>75</sup> Put simply, the ‘end result,’ as already discussed, describes a society in which victims and perpetrators reconcile their differences and are able to live together in relative peace; inevitably the specific characteristics of the end result will depend largely on key variables such as the nature of the conflict which has

<sup>73</sup> Bloomfield, David: “Reconciliation after Violent Conflict: A Handbook,” (Stockholm: International Institute for Democracy and Electoral Assistance, 2005) p12.

<sup>74</sup> Bloomfield, David: “Reconciliation after Violent Conflict: A Handbook,” (Stockholm: International Institute for Democracy and Electoral Assistance, 2005) p16.

<sup>75</sup> Bloomfield, David: “Reconciliation after Violent Conflict: A Handbook,” (Stockholm: International Institute for Democracy and Electoral Assistance, 2005) p12.

occurred. The 'process' of reconciliation on the other hand is far more difficult to define. Bloomfield describes it as an often long-term, broad and deep-rooted process which demands the change in attitudes, aspirations, emotions and beliefs of entire societies.<sup>76</sup>

Hayner argues that there are 3 questions which should be asked to decipher whether or not a reconciliation process has taken root:<sup>77</sup>

1. How has the past been dealt with – Can victims and perpetrators openly discuss past events without conflict?
2. What are the relationships between former enemies – Are relationships between victims and their former oppressors based on the past or the present? Are past events still being used to cause tensions?
3. Is there a general consensus over past events – Reconciliation relies on the agreement of one version of the past. In recent years, conflict after transition often results from the failure of a society's people to agree on one version of the past, e.g. Palestine/Israel.

Hayner's three questions represent a starting point which provides us with a basic idea of the material conditions which may result from successful reconciliation processes. They also demonstrate the key role which can be played by truth-seeking processes. This highlights the importance of the role which truth commissions can play in helping former enemies reconcile over past atrocities and live peacefully together within the same community.

### **The 'Two Levels' of Reconciliation**

Secondly, it is necessary to understand that reconciliation occurs on two different levels. Throughout her article '*Reconciliation for Realists*,' Susan Dwyer defines these two levels as the 'micro' and 'macro' levels of reconciliation.<sup>78</sup>

<sup>76</sup> Bloomfield, David: "Reconciliation after Violent Conflict: A Handbook," (Stockholm: International Institute for Democracy and Electoral Assistance, 2005) p12.

<sup>77</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p161.

1. Macro-level reconciliation – This is reconciliation on a national/collective level. It can be encouraged by governments through the introduction of truth commissions which establish an official account of past atrocities e.g. The South African Truth and Reconciliation Commission. It is hoped that the truths published in these accounts will encourage ‘micro-level’ reconciliation.
2. Micro-level reconciliation – This is reconciliation at an interpersonal level, between victims and their oppressors; it is far more complex and difficult to achieve than ‘macro-level’ reconciliation. The main reason for this is that it cannot be introduced or enforced by any specific body or power group; micro-level reconciliation occurs at the will of the individuals concerned. The fact that every individual is likely to respond differently to a truth commission’s findings and a reconciliation process, further complicates proceedings: “Forgiveness, healing, and reconciliation are deeply personal processes, and each person’s needs and reactions to peacemaking and truth-telling may be different.”<sup>79</sup>

### **Northern Ireland: The Impact of ‘Micro-level’ Reconciliation**

One particular case study which often arises when discussing ‘micro-level’ reconciliation is the case of Northern Ireland; this is probably the most convincing example to date which demonstrates the successful development of ‘reconciliation from below.’

The story of Northern Ireland’s recent history is a tale of bitter ethno-political conflict which has divided communities and taken lives. At the heart of this conflict there exists a bitter rivalry between protestant unionist and catholic nationalist communities in Northern Ireland.

Despite its weak political institutions, there is no absence of strong, non-government civil society institutions; these groups are so powerful that it is argued they often wield more influence over Northern Ireland’s populace than its government. A ‘*Civil Society Index Report for Northern Ireland*’ compiled by CIVICUS for example, indicates that Northern Ireland has a strong Civil Society environment, which is able to promote positive values and

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<sup>78</sup> Dwyer, Susan: “Reconciliation for Realists,” (*Ethics and International Affairs*, Volume 13, Issue 1, March 1999) p83.

<sup>79</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p155.

has a 'better than average' impact level.<sup>80</sup> Consequently, the conflict which has plagued this society for so long is often blamed on these power groups: "One of the main causes of the prolonged and intractable conflict is precisely the inability of civil society to generate enough of a consensus to allow for governmental institutions powerful enough to provide social stability."<sup>81</sup>

Whether or not Northern Ireland's civil society groups should be blamed for her political strife, is not relevant to this particular discussion. The fact is that, in this instance, these same civil society groups share enough power and influence to be able to foster grass roots, 'micro-level' reconciliation processes which have begun to heal and reintegrate the nation's once divided communities: "It is incumbent upon all organisations operating in this arena to promote the values and principles that underpin civil society in Northern Ireland."<sup>82</sup>

Throughout his works on Northern Ireland, Scott Appleby describes "a rare occurrence of a home-grown peace transformation that might actually work well."<sup>83</sup> Both Appleby and Wells attribute recent developments in Northern Ireland to the strengths and weaknesses of religious institutions: "The churches were once part of the problem; they are now part of the solution."<sup>84</sup> Whatever the reason for these developments, they do provide us with evidence to suggest that in some cases, 'macro-level' organs, such as truth commissions, may not be a necessary requirement of all reconciliation processes: "It means that the fabric of civil society is strong enough to encourage and enable discourse about forgiveness and reconciliation to go on without an ad hoc commission created for that purpose."<sup>85</sup>

More than anything, the Northern Ireland example highlights the invaluable role which can be played by non-government civil society groups by encouraging the development of

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<sup>80</sup> McCarron, JJ: "Civil Society Index Report for Northern Ireland," (CIVICUS, February 2006) Available at [https://www.civicus.org/new/media/CSI\\_northern\\_ireland\\_Executive\\_summary.pdf](https://www.civicus.org/new/media/CSI_northern_ireland_Executive_summary.pdf) (last accessed 24th February 2012).

<sup>81</sup> Wells, Ronald A: "Northern Ireland: A Study of Friendship, Forgiveness and Reconciliation," (taken from Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p190.

<sup>82</sup> McCarron, JJ: "Civil Society Index Report for Northern Ireland," (CIVICUS, February 2006) Available at [https://www.civicus.org/new/media/CSI\\_northern\\_ireland\\_Executive\\_summary.pdf](https://www.civicus.org/new/media/CSI_northern_ireland_Executive_summary.pdf) (last accessed 24th February 2012).

<sup>83</sup> Appleby, Scott (taken from Daniel Philpott: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p189.

<sup>84</sup> Appleby, Scott (taken from Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p189.

<sup>85</sup> Wells, Ronald A: "Northern Ireland: A Study of Friendship, Forgiveness and Reconciliation," (taken from Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p190.

‘micro-level’ reconciliation at a grass-roots level. This strategy often proves far more effective than the ‘macro-level’ reconciliation processes introduced by government institutions. Having said that, recent ‘macro-level’ organs developed by states such as South Africa, have demonstrated their ability to encourage ‘micro-level’ reconciliation: “The authorities cannot impose trust and empathy by decree... Nevertheless, they can create a climate that encourages private steps towards reconciliation.”<sup>86</sup>

In fact, where possible, there is no reason why both levels of reconciliation cannot be utilised when healing divided societies; this is the exact strategy which will be used when designing our Zimbabwean Truth Commission framework in the concluding chapter of this thesis. For this to be possible, it is important that both the micro and macro level reconciliation processes are attuned; if the government and society pursue different agendas, reconciliation processes will often be ineffective and sometimes damaging. Examples of the negative impacts of these clashes upon truth commission investigations are presented in Chapter 2.

An understanding of both ‘macro-level’ and ‘micro-level’ forms of reconciliation demonstrates that each can play a substantial part in reconciling post-conflict societies. It also becomes apparent that all-embracing reconciliation can only occur if it is the will of the people (a fundamental requirement of micro-level reconciliation processes) and that a comprehensive understanding of the society in question is required in order to determine which levels of reconciliation are both feasible and appropriate.

### **The Varying Impacts of Violence**

Before we explore in greater detail, the different stages of reconciliation, it is necessary to look at the various impacts of violence; a better understanding of these effects is required in order to account for the harmful consequences they can have for reconciliation processes. In the early stages of *‘The Politics of Past Evil,’* Daniel Philpott seeks to outline long term consequences of state violence.<sup>87</sup> These are summarised below:

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<sup>86</sup> Hyse, Luc: “The Process of Reconciliation,” (Taken from: Bloomfield, David and Barnes, Teresa: “Reconciliation after Violent Conflict: A Handbook,” (Stockholm: International Institute for Democracy and Electoral Assistance, 2005)) p26.

<sup>87</sup> Philpott, Daniel: “The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice,” (Indiana: University of Notre Dame, 2006)) p17.

1. Physical, psychological, economic or emotional harm – The immediate consequences of state violence, according to Philpott are physical, psychological, economic or emotional harm. He compares the serious nature of this form of harm with the damage caused by natural disasters; although natural disasters can also lead to the above, state oppression seeks to directly target and victimise its civilians, instead of protecting their interests. These kinds of effects were witnessed among the victims of South Africa's Apartheid regime: "The psychic damage and economic deprivation caused by the myriad of injustices of Apartheid were wounds wrought by systems of laws."<sup>88</sup> Therefore, the notion that South African state law had been specifically designed to endorse the oppression of various sectors of South African society would have been particularly psychologically and emotionally damaging for those targeted. This can also cause long-term damage to the relationship shared between a state and its citizens. As well as seeking to rebuild this tarnished relationship, transitional governments will also have to introduce extensive reforms to state infrastructures, including the introduction of more effective constitutions, to remedy this damage.
  
2. The victim can suffer from ignorance – As previously discussed, when looking at the significance of finding out the truth behind the orchestration of past atrocities, victims can suffer greatly from not knowing what happened and why. Whether it be not knowing the location of their relatives or not knowing why crimes were committed against them; ignorance can continue to harm and torment victims long after the cessation of violence, and can seriously damage healing processes: "Not knowing the truth of one's past, especially the most traumatic parts of it, is itself a serious form of torment."<sup>89</sup>
  
3. The victim is made to feel 'politically dead' – Another form of psychological harm can come from the knowledge that victims are not fairly represented by the state. As a result they are made to feel like they are not legitimate members of their own societies. The persecution of the Jews in 1930s/40s Germany can be drawn upon as an example of this form of torment. Hitler's Nazi government engineered Germany's political system so that it gave the Jewish sector of German society no political

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<sup>88</sup> Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p17.

<sup>89</sup> Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p17.

representation. This is a common strategy utilised by authoritarian regimes to oppress a society's specific identity groups.

4. The victim is not recognised as a victim – Leading on from the previous point, the victim is further traumatized when his or her hardships are not even acknowledged by the state. If the state does not recognise these individuals as victims, further psychological torment can result. Victims should have the right to have their sufferings acknowledged. Truth commissions often provide victims with this recognition and give them the opportunity to publically share their experiences, often in the presence of those responsible.
5. Lack of accountability – Further damage is caused when those responsible for committing human rights violations are not prepared to acknowledge their part in proceedings. Having committed crimes of this magnitude, guilty parties should be held accountable not just to their victims but also to the state; though this does not necessarily imply that they should be punished. By not being held accountable for crimes committed against the state, guilty parties can seriously undermine the legitimacy and authority of the state in question.
6. Failure to confess and show remorse – Finally, Philpott argues that further damage can result from the failure of guilty parties to confess and express regret for their part in proceedings. He states that this failure would not only cause the victims additional trauma, but would also prevent any possibility that the victim might forgive their oppressor. The failure to confess or show remorse can also harm the perpetrator; trauma and social exclusion can result from prolonged guilt and an inability to move on from past experiences. Though not always present in reconciliation processes, confession and forgiveness would undoubtedly help mend fractured societies.

Having gained a greater awareness of the damaging effects of violence, it is easier to comprehend how important it is that transitional justice processes should attempt to reverse these impacts in order to encourage conditions more in keeping with the promotion of reconciliation processes.

## The Different Stages of Reconciliation

As with any process, there are various stages of the ‘reconciliation process’ through which each society will pass as part of the healing process. Throughout *‘A Working Definition of Reconciliation,’* Brandon Hamber and Grainne Kelly argue that a comprehensive reconciliation process generally encompasses the following five interwoven and interrelated strands:<sup>90</sup>

1. Developing a shared vision of an interdependent and fair society – Hamber and Kelly argue that the whole society, at all levels must develop one common vision of an ‘interdependent, just, equitable, open and diverse’ shared future. They claim that this is a critical phase of the reconciliation process.
2. Acknowledging and dealing with the past – They also argue that the society in question must acknowledge the ‘hurt, losses, truths and suffering of the past.’ This process can be achieved with the assistance of the transitional justice mechanisms referred to throughout this chapter. Hamber and Kelly emphasise the importance of non-repetition of past wrongs through a process of repentance, acceptance and learning.
3. Building positive relationships – Hamber and Kelly state that another key stage of the reconciliation process is the rebuilding of fractured relationships by addressing issues of trust, accepting commonalities and differences and accepting those with different identities.
4. Significant cultural and attitudinal change – They also state that people must change their attitudes towards one another, by breaking down a culture of fear and mistrust and creating opportunities where ‘people can hear and be heard,’ in order to create ‘a culture of respect for human rights and human difference.’
5. Substantial social, economic and political change – Finally, they argue that the social, economic and political structures responsible for past conflicts must be ‘identified, reconstructed or addressed and transformed.’ This is obviously a critical part of any

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<sup>90</sup> Hamber, Brandon and Kelly, Grainne: “A Working Definition of Reconciliation,” (*Democratic Dialogue*, Belfast, Sept 2004) p3/4.



reconciliation process; it will be very difficult for a society to reconcile if the infrastructures responsible for the initial conflict remain in place.

Brandon and Hamber's five strands of reconciliation have been presented here to serve as a rough guide of the various stages through which societies must pass as part of a comprehensive reconciliation process. They demonstrate what an all-encompassing process this must be; they stress the importance of the involvement of the entirety of the society in question. Whilst these strands show some strengths as 'rough guidance,' in the main, they are simply too demanding and unrealistic for most transitional societies. It seems highly unlikely for example, that 'the whole [of a transitional] society' will develop one common vision of a shared future; even the most well-established present-day democracies struggle to achieve this feat. In addition, the ordering of these five strands seems inaccurate; 'substantial social, economic and political change' must be one of the initial stages, as a prerequisite to help promote the other aforementioned strands of reconciliation. It should also be noted that the successful application of these processes will require the development of both 'macro' and 'micro-level' reconciliation.

Cited in *'The Process of Reconciliation,'* Luc Hyse presents a similar summary of the different stages of the reconciliation process, but places significant emphasis on the importance of communication and the role of pre-existing civil society groups: "This involves the building or renewal of communication inside the communities of victims and offenders and between them. Political and community leaders, non-governmental organisations and religious institutions have a responsibility here."<sup>91</sup> Hyse also stresses the importance of victims learning to 'separate the sin from the sinner,' and attempting to understand why their oppressors acted in such a way. He suggests that truth commissions can assist with this process by presenting the past in terms of 'shared suffering;' in such a way victims might learn to empathise with their former oppressors: "More important still is the recognition that victims and offenders share a common identity, as survivors and as human beings."<sup>92</sup>

Each of these strands introduced by Hamber, Kelly and Hyse, provides a useful insight into the progression of the reconciliation process. It should also be noted that the successful

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<sup>91</sup> Hyse, Luc: "The Process of Reconciliation," (Taken from: Bloomfield, David and Barnes, Teresa: "Reconciliation after Violent Conflict: A Handbook," (Stockholm: International Institute for Democracy and Electoral Assistance, 2005)) p20.

<sup>92</sup> Hyse, Luc: "The Process of Reconciliation," (Taken from: Bloomfield, David and Barnes, Teresa: "Reconciliation after Violent Conflict: A Handbook," (Stockholm: International Institute for Democracy and Electoral Assistance, 2005)) p21.

development of a comprehensive reconciliation process is not always dependent upon the presence of all of these strands. Each transitional state will have differing political, social and economic pre-conditions; these characteristics will influence the strands of reconciliation which are required to heal that particular society. Though inevitably, the more strands of reconciliation which are in place, the more likely it is that this process will succeed.

### **Conditions which Encourage Reconciliation**

Transitional governments should seek to develop the following conditions within their societies in order to assist the reconciliation process:

1. Ceasing conflict – It is clear from Hyse’s assessment that reconciliation can only be achieved in peaceful societies. Truth commissions are never established during periods of war as this jeopardises the safety of those involved and the success of the investigation. Therefore it is essential that governments pursuing reconciliation end any threat of violence, as their first course of action.
2. Restructuring society/addressing pre-existing inequalities – As a consequence of prolonged periods of conflict, societal infrastructures are often severely damaged and unable to perform their day-to-day tasks effectively. This can seriously jeopardise the reconciliation process, which benefits from reformed government institutions and an impartial judicial system which upholds and protects the rule of law. Structures which encourage inequality, which were introduced by the outgoing regime, should also be reformed to ensure that all civilians’ human rights are equally respected.
3. Truth telling – As already mentioned, finding out the truth about past events, to prevent victims suffering from ignorance, can go a long way towards reconciling them with their former enemies (see ‘Establishing the Truth’). Truth-finding organs such as the truth commission can act as catalysts for reconciliation processes by establishing a truthful account of past atrocities: "The presence of the commission, its public authority, the millions of witnessing citizens, and ultimately a permanent public record of the injustices committed all aid this restoration."<sup>93</sup> This process is

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<sup>93</sup> Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p21.

even more effective if the truth is endorsed by both all parties concerned, including the state.

4. Acknowledgement and accountability – Victims can be greatly encouraged to reconcile with their oppressors once they feel that their hardships have been formally acknowledged by those responsible or by the state: “Victims often say that they cannot forgive their perpetrators, and have no desire or ability to reconcile, until those who have caused them pain acknowledge their acts and, ideally, ask for forgiveness and provide some form of symbolic reparation.”<sup>94</sup> This formal acknowledgement can be carried out in many ways, such as through the recognition of their crimes by perpetrators at public truth commission hearings. Having read numerous accounts of truth commission hearings, it has become evident that for guilty parties, having to sit and listen to victims’ testimonies and acknowledging that they are responsible for this suffering, can constitute a tough form of punishment; this is supported by the testimonies of perpetrators under investigation by South Africa’s TRC: “I have to live with this hell. The problem is in my head, my conscience. There’s only one way to be free of it. Blow my own brains out. Because that’s where my hell is.”<sup>95</sup>

Occasionally states formally acknowledge the historical accounts published within truth commission reports and publically apologise for the atrocities enforced by their predecessors. In Chile, for example, President Aylwin acknowledged the Chilean Commission’s report as being an accurate and legitimate account of what happened, in a televised national address. Such acknowledgements encourage victims to reconcile as they feel that their suffering has been formally recognised. Past truth commission enquiries which have facilitated the formal acknowledgement of past human right abuses; this will be explored further throughout Chapter 2.

In a similar way, accountability can strengthen reconciliation processes. By holding guilty parties accountable for their actions both against victims and against the state, victims often feel that their rights have been recognised: “Accountability can be designed flexibly to further the restoration of both the offender and his ambient

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<sup>94</sup> Hayner, Priscilla B: “Unspeakable Truths: Facing the Challenge of Truth Commissions,” (London: Routledge, 2002) p164.

<sup>95</sup> Tutu, Desmond: “No Future without Forgiveness,” (London: Ryder, 1999) p51.

broken relationships and to further the other practises of reconciliation.”<sup>96</sup> It should be noted though, that for some transitional and post-conflict societies, accountability is just not plausible. Often these societies are far too fragile or ill-equipped to achieve accountability; in such instances, they are much more reliant upon the willingness of both the victim and perpetrator to engage in ‘micro-level’ reconciliation processes.

5. Restorative/retributive justice – Both forms of justice can assist reconciliation processes, though governments should avoid damaging already fragile reconciliation processes by forcing justice (in whichever form) upon a society when it is not appropriate. These forms of justice should only be implemented when it is determined that they will achieve a positive outcome for the society concerned (see retributive v restorative justice debate). It should be noted that the punishments meted out by retributive justice proceedings can encourage accountability and can be seen as a formal recognition of the rights of victims.
6. Time – States must not expect reconciliation to occur over night; it is often a long process which occurs over prolonged periods of time. It is therefore important not to pass premature judgement upon truth commission investigations; time must be allowed for victims to learn to live with their oppressors once again and for wounds to heal.

As ever, the different measures required to enhance and accommodate the reconciliation process will depend on the circumstances and context faced by the society in question.

### **The Role of Forgiveness**

It is clear from our analysis of this complex concept, that forgiveness can play a substantial part in well-established reconciliation processes. This is demonstrated by a closer look at its definition with reference to the characteristics of reconciliation processes already discussed in this chapter.

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<sup>96</sup> Philpott, Daniel: “The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice,” (Indiana: University of Notre Dame, 2006)) p23.

The standard dictionary definition of the verb 'to forgive' is usually divided into three parts; 'the ceasing of blame or resentment,' 'the granting of a pardon for wrongdoing' and 'the freeing from obligation of debt.'<sup>97</sup> Each of these meanings holds particular significance when looking at the contribution of forgiveness to reconciliation processes.

The ceasing of blame or resentment is an integral part of any reconciliation process as it aids the restoration of the relationship shared between victim and perpetrator; whilst it grants the latter a fresh start and the opportunity to re-join society, it also enables the victim to heal, be free from anger and hatred and be at peace with the past.

The granting of a pardon for wrong-doing and the freeing from obligation of debt promotes reconciliation through social repair as it eradicates the lasting legacy of past human rights abuses and allows both parties to re-establish themselves within a society on equal terms. It is important to note, that as a necessary condition, that this can be achieved by both forgiveness and by retributive justice; the latter pardons the perpetrator after they have fulfilled the terms of their punishment. Forgiveness also promotes other positive emotions such as compassion, empathy and understanding which reinforce this social repair.

The positive impacts of forgiveness can be demonstrated by looking at the negative impacts of 'unforgiveness.' Throughout *'Forgiveness, Unforgiveness, Health and Disease,'* Harris and Thoresen present the destructive effects of 'unforgiveness:' "In the short term, unforgiveness has been shown to produce intense negative emotions as well as physiological responses consistent with other stress responses."<sup>98</sup> They state that these negative emotions and physiological responses can take the form of resentment, blame, bitterness, hostility, hatred, anger, and fear which may be fostered through rumination. Such reactions are likely to hinder any potential reconciliation process.

Among the various negative impacts associated with unforgiveness presented by Harris and Thoresen, surely the most damaging to any reconciliation process has to be 'enforced social isolation.' They suggest that the erosion of social networks can occur either when victims isolate themselves from society for fear of re-victimization, or when negative emotions

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<sup>97</sup> "The Collins Dictionary of the English Language," (Oxford: William Collins Sons and Co. Ltd, 1979) p569.

<sup>98</sup> Worthington, Everett: "The Handbook of Forgiveness," (New York: Routledge, 2005) p323.

alienate them from their friends and loved ones.<sup>99</sup> The social erosion which results from unforgiveness can also promote the enforced exclusion of guilty parties from society.

Forgiveness therefore acts as a catalyst which fosters the long-term rehabilitation and social development of both the victim and the perpetrator; on this basis, the parallels between transitional justice and forgiveness processes are clear.

Given these apparent similarities and the significance of the role of forgiveness in reconciliation processes, it is necessary to assess whether or not specific conditions need to be present in order for forgiveness to develop. This question has drawn a clear split between the opinions of Amstutz and Wolterstorff. Amstutz claims that forgiveness is dependent on the presence of various 'core elements:' "including consensus about past wrongdoing, remorse and repentance, renunciation of vengeance, cultivation of empathy and mitigation or cancellation of a deserved penalty."<sup>100</sup>

Wolterstorff on the other hand argues that forgiveness can occur irrespective of some of these factors. He states that there are two conditions in which forgiveness can occur. The first is when the victim forgets the wrong which has occurred; reconciliation through amnesia. The second is when the wrongdoer disassociates himself from the wrong through repentance, allowing forgiveness without forgetting the sin.<sup>101</sup>

Though Wolterstorff's argument would definitely prove more favourable for truth commissions and the reconciliation processes they often aim to foster, I would suggest that it presents a somewhat simplistic analysis of this concept; can 'reconciliation through amnesia' really be classed as a form of forgiveness? Whilst carefully considering these questions, it is possible to draw reference to the aforementioned policies of the government of Mozambique upon the cessation of its civil war. When the Frelimo Government disregarded the possibility of establishing any truth-seeking process to investigate the crimes committed during the civil war, it was questionable whether or not the people of Mozambique could honestly say that they had forgiven their oppressors, as opposed to being forced to forget their wrongdoings.

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<sup>99</sup> Worthington, Everett: "The Handbook of Forgiveness," (New York: Routledge, 2005) p325.

<sup>100</sup> Wolterstorff, Nicholas: "The Place of Forgiveness in the Actions of the State," (taken from Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p96.

<sup>101</sup> Wolterstorff, Nicholas: "The Place of Forgiveness in the Actions of the State," (taken from Philpott, Daniel: "The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice," (Indiana: University of Notre Dame, 2006)) p101.

Andrew Schaap's *'Political Forgiveness,'* presents a comprehensive analysis of the concept of forgiveness in the political realm.<sup>102</sup> This analysis starts by looking at the argument that forgiveness requires the setting aside of resentment. Schaap states that the action of the oppressor leads the victim to resent both the material harm inflicted and the insulting message that comes with it. Although he states that forgiveness should not rely upon retribution, remorse, reparation or restitution, he concedes that remorse does encourage forgiveness as it results in the wrongdoer withdrawing the endorsement of the insulting message.

With reference to the works of fellow theorists, Schaap then looks at the inadequacies of necessity and reason as grounds for forgiveness in politics from the liberal and realist perspective. Firstly, he argues that the realist approach, which claims that forgiveness is a 'necessity' for the survival of political association is flawed because in this case 'forgiveness is not freely given but bargained away.' He also argues that forgiveness involves the condonation of the initial wrongdoing: "Forgiving risks lapsing into condonation when we do not protest but simply overlook a wrong in order to maintain a relationship with the other."<sup>103</sup>

Schaap also finds flaws in the liberal perspective, which states that forgiveness is appropriate in terms of moral reason; forgiving ones oppressor and overcoming resentment and anger towards them is the right thing to do in order to promote the wellbeing of both parties. He states that although forgiveness in terms of moral reason may be appropriate in private life, it should be considered redundant in political life: "For, although it may be laudable to strive to overcome resentment towards others in our private lives, we stretch the bonds of ordinary human sentiment too far in seeking to extend such generosity to those with whom we lack sustained emotional contact and whose values seem alien to our own."<sup>104</sup>

Having dismissed these perspectives, in line with Max Weber's ethic of responsibility, Schaap states that political grounds for forgiveness is furnished by an 'ethic for worldliness:' "In undertaking to forgive for the sake of the world we share in common, we must consider the significance and consequences of our act for our life in common."<sup>105</sup> This approach, he claims, avoids the flaws of the realist and liberal approaches. This justification for forgiveness is in-keeping with one of the central claims of this thesis; that the restorative justice concepts presented through Chapter 1 are justified if they achieve a positive outcome

<sup>102</sup> Schaap, Andrew: "Political Reconciliation," (Oxon: Routledge, 2005) p103.

<sup>103</sup> Murphy, Jeffrie: "Forgiveness and Mercy," (Cambridge: Cambridge Uni Press, 1988) p15.

<sup>104</sup> Schaap, Andrew: "Political Reconciliation," (Oxon: Routledge, 2005) p108.

<sup>105</sup> Schaap, Andrew: "Political Reconciliation," (Oxon: Routledge, 2005) p112.

for the transitional societies which they seek to assist. This ‘consequentialist argument’ is looked at in greater detail when assessing the role of justice in assisting transitional states. It is also possible to draw parallels between this approach and the concept of communitarian responsibility promoted by the Ubuntu philosophy, which will be discussed shortly.

What cannot be denied is the impact that forgiveness can have on a reconciliation process: “In the act of forgiveness we are declaring our faith in the future of a relationship and in the capacity of the wrongdoer to make a new beginning on a course that will be different from the one that caused us the wrong. We are saying here is the chance to make a new beginning.”<sup>106</sup> As Tutu demonstrates here, forgiveness helps victims and perpetrators reconcile. It is difficult to envisage a thorough, comprehensive reconciliation process that is not facilitated by some level of forgiveness.

### **The Role of Religion**

“Theologians and religious activists, in their theorising and their political involvements, have fashioned an approach to transitional justice with a distinct centre of gravity that has important consequences for politics. Reconciliation is their axial idea.”<sup>107</sup>

It is very difficult to discuss the concepts of reconciliation and forgiveness without discussing religion; after all, many past truth commissions have utilised their peoples’ faiths in order to encourage the development of reconciliation and forgiveness: “One of the long-term influences of Christianity on our politics has been the tempering of the demands of retributive justice with forgiveness.”<sup>108</sup>

Throughout *‘What Religion brings to the Politics of Transitional Justice,’* Daniel Philpott discusses the “Rise of religion as a political force,”<sup>109</sup> and its influence on transitional justice. He looks at the two contrasting paradigms of ‘liberal human rights’ and ‘reconciliation,’ and examines the approaches they take when dealing with those responsible for the orchestration

<sup>106</sup> Tutu, Desmond: “No Future without Forgiveness,” (London: Ryder, 1999) p220.

<sup>107</sup> Philpott, Daniel: “What Reconciliation brings to the Politics of Transitional Justice,” (*Journal of International Affairs*, Fall/Winter 2007, vol.61, no.1) p97.

<sup>108</sup> Nicholas Wolterstorff: “The Place of Forgiveness in the Actions of the State,” (taken from Philpott, Daniel: “The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice,” (Indiana: University of Notre Dame, 2006)) p109.

<sup>109</sup> Philpott, Daniel: “What Reconciliation brings to the Politics of Transitional Justice,” (*Journal of International Affairs*, Fall/Winter 2007, vol.61, no.1) p93.



of human rights violations. His analysis of today's mainstream religions shows that despite their fundamental differences they do come to some form of consensus with regards to political reconciliation: "In all of these traditions, reconciliation means, broadly, restoration of a broken relationship to a state of right relationship... They envision a fuller restoration, involving apology, forgiveness, empathic acknowledgement of suffering and the transformation of enmity between both groups and individuals."<sup>110</sup> The shared moral beliefs between the mainstream religions (Christianity, Judaism and Islam) and the concept of reconciliation are clearly demonstrated by Philpott here. He then examines the impact of religious groups upon reconciliation and transitional justice processes in recent history. He states that out of the fifteen cases where religion has held a prominent presence in societies undergoing political transition, 8 of these cases demonstrate the successful impact of these religions upon transitional justice processes. With reference to these specific examples, Philpott argues that these religious structures influenced transitional justice processes by "shaping the decision for truth commissions through speaking out publically, lobbying and sometimes even organising efforts to investigate past injustices themselves... They also shaped the actual functioning of truth commissions by influencing the selection of commissioners, providing logistical support for organising and conducting hearings, locating and supporting victims and witnesses and providing counselling in the wake of hearings."<sup>111</sup>

The most obvious example of this is the South African Truth and Reconciliation Commission: "The TRC process is one of the most dramatic and helpful signs of an authentically Christian contribution to political life to emerge in many years."<sup>112</sup> Though hesitant at first, Desmond Tutu began each truth commission hearing with a recital of the Lord's Prayer. By doing this he sought to harness his peoples' religious beliefs to encourage them to forgive their oppressors. As the TRC process continued, he placed more and more of a religious emphasis on proceedings. This course of action, though widely criticised by those who believe that religion should be kept separate from the affairs of the state, is considered key to the success of the South African TRC. It is unsurprising therefore, that many modern-day truth commissions seek to mirror the TRC's religious format.

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<sup>110</sup> Philpott, Daniel: "What Reconciliation brings to the Politics of Transitional Justice," (*Journal of International Affairs*, Fall/Winter 2007, vol.61, no.1) p97.

<sup>111</sup> Philpott, Daniel: "What Reconciliation brings to the Politics of Transitional Justice," (*Journal of International Affairs*, Fall/Winter 2007, vol.61, no.1) p101.

<sup>112</sup> Jones, Gregory L: "Embodying forgiveness: A Theoretical Analysis," (Michigan: B Eerdmans Pub co, 1995) p22.

J. S. Mbiti makes similar claims to Philpott, by stressing that religion often acts as ‘an agent of social reconstruction “which provides people with a view of the world, and as that which inspires new ideas.”’<sup>113</sup> Similarly, Jesse Mugambi argues that “religion is the most vital project for the people who are undergoing a rapid change – as in the post-colonial era.”<sup>114</sup>

The question arises; in which instances can religious institutions have a positive impact upon transitional justice processes? After all, as Philpott’s statistic demonstrates, in 7 out of 15 of the aforementioned cases, religious groups failed to positively influence transitional justice: “Religious actors who influenced their government’s institutions of transitional justice, held both a political theology of reconciliation and institutional autonomy.”<sup>115</sup> As well as stating that religious institutions must represent a significant proportion of their population in order to be able to influence such a process, Philpott also suggests that in the past, religious actors were able to influence proceedings because of their ability to articulate and promote the language of reconciliation whilst operating independently from their government. Though the latter requirement will protect the impartiality and integrity of the process, this should not be seen as a compulsory pre-requisite; religious institutions in societies which do not characterise a clear separation between church and state can still influence transitional justice processes.

Philpott also stresses the significant presence of reconciliation and transitional justice theory within many different religious infrastructures; it is not solely present within Christian based institutions: “Comparative analysis reveals the presence of a political theology or culturally-rooted concept of reconciliation, with variations in its propositions and its warrants, in an impressively wide array of religions and cultures.”<sup>116</sup>

To conclude, Philpott has highlighted the possible contributions which can be made by religious institutions towards reconciliation and transitional justice processes operating in transitional and post-conflict societies. Evidently, this will not always be the case as various conditions must be present for this to be possible; in order to effectively assist these processes, religious institutions must have a considerable support base and must support and promote the language of reconciliation. Operational independence from government

<sup>113</sup> Mbiti, J. S: “An Introduction to African Religion,” (London: Heinemann, 1975) p195.

<sup>114</sup> Mugambi, Jesse: “From Liberation to Reconstruction: Africa after the Cold War,” (Nairobi: E.A.E.P., 1995).

<sup>115</sup> Philpott, Daniel: “What Reconciliation brings to the Politics of Transitional Justice,” (*Journal of International Affairs*, Fall/Winter 2007, vol.61, no.1) p102.

<sup>116</sup> Philpott, Daniel: “What Reconciliation brings to the Politics of Transitional Justice,” (*Journal of International Affairs*, Fall/Winter 2007, vol.61, no.1) p106.

influence will also assist this process. The versatility of truth commission frameworks should enable them to adapt to accommodate the various religions and belief systems followed by each society. For this reason, a comprehensive understanding of the social fabric of each society is necessary, prior to the establishment of the transitional justice body.

Inevitably, not all transitional societies will benefit from the impetus of pre-existing religious institutions and belief systems. And indeed, where present, history shows that sometimes religion can also have a divisive effect upon the social fabric of societies. In such situations, this thesis argues that these processes are still possible if the society contains a pre-existing 'commitment to justice.'

### **The Necessity of a Pre-existing 'Commitment to Justice'**

In addition to the conditions mentioned here, the successful impact of truth commission investigations can also be heavily influenced by the ethical characteristics of a society. By ethical, the thesis refers to the basic beliefs and moral codes which exist within specific cultures. One of the central claims of the thesis argues that one of the most decisive factors, which often dictate the successes or failures of truth commission bodies, is the pre-existence of a 'commitment to justice.'

The presence of a 'commitment to justice' within a society, means that, on a subconscious level, the individuals and groups involved and effected by the state's transition want to develop a just and fair society. In other words, they understand the difference between right and wrong, and want to create a society with laws which protect and promote this basic moral fabric. The justice we are referring to here is not necessarily retributive, but more restorative (as introduced in the next section of this chapter). Such an ethos cannot be forced upon a society; it cannot be introduced by a government or an international organisation as part of a restoration process. It must pre-exist and must be present within the subconscious of the collective; having said that, it can be harnessed and developed by an influential authority or institution.

Within many African cultures, various ethical beliefs and attitudes exist which make the successful contribution of transitional justice processes a distinct possibility. This thesis looks specifically at the influence of Ubuntu upon post-conflict African societies, and the role it

plays in promoting this 'commitment to justice.' The Ubuntu philosophy itself, present among many African communities, stresses the importance of an individual's commitment to the wellbeing of their community. This communitarian philosophy promotes an understanding of the prioritisation of the collective over the individual and in this way helps individuals see how their destinies are intertwined. This philosophy promotes a 'commitment to justice' because those who believe in it understand the importance of preserving justice and peace throughout their communities, even if this requires individual sacrifice.

As this chapter stresses, this commitment to justice can be reinforced by various institutions which exist within societies. In the West, various religious groupings may promote such an ethos for justice. However, African cultures benefit from a wider array of institutional layers which can reinforce and develop this commitment within their societies. As well as the various religious institutions which are present around the world, Africa also benefits from various tribal structures which may also promote such a commitment. These grassroots structures reinforce this commitment to justice by promoting the Ubuntu philosophy and stressing the importance of the preservation and restoration of one's community.

Sadly for Africa, a negative consequence of the existence of infrastructures which promote a commitment to justice is that they can often make these societies more prone to conflict; justice can be pursued through conflict as well as through peaceful means. To demonstrate this, it is possible to draw reference to the aforementioned Northern Ireland case study; although this thesis suggests that civil society groups have assisted the development of micro-level reconciliation in Northern Ireland, they were also responsible for igniting the initial conflict.

That being said, these infrastructures provide much hope for transitional and post-conflict African states, as they often promote the necessary ethical and moral belief systems which uphold this commitment to justice. Such belief systems can be harnessed by truth commission bodies to encourage communities to embrace the transitional justice processes they seek to establish. The various successes of South Africa's Truth and Reconciliation Commission can be attributed to its ability to harness the 'commitment to justice' promoted by the Ubuntu philosophy, which is instilled by the country's grassroots tribal and religious structures.

By adapting its frameworks to harness the ethical and moral beliefs present within African societies, this thesis can ensure that truth commission bodies continue to successfully assist transition processes throughout the African continent. That is not to say that where these

ethical and moral beliefs are lacking, transitional justice mechanisms should not be considered, but rather that the expectations placed upon them should be scaled down significantly.

### **The Impact of the Ubuntu Philosophy upon Reconciliation and Forgiveness Processes**

“Ubuntu refers to the person who is welcoming, who is hospitable, who is warm and generous, who is affirming of others, who does not feel threatened that others are able and good for [this person] has a proper self-assurance that comes from knowing that they belong in a greater whole, and know that they are diminished when another is humiliated, is diminished, is tortured, is oppressed, is treated as if they were less than who they are. What a wonderful world it can be, when we know that our destinies are locked inextricably into one another’s.”<sup>117</sup>

This quotation, taken from Desmond Tutu’s *‘The New World Order,’* provides both a broad definition of Ubuntu and demonstrates the impact that this philosophical concept could have upon the possible success of transitional justice processes. In recent times, the concept of Ubuntu is increasingly placed under the microscope, as analysts seek to examine how its qualities can help societies reconcile after periods of conflict and political transition. This is mainly as a consequence of its contributions towards the successes of South Africa’s ‘Truth and Reconciliation’ processes: “Ubuntu was the glue which held together traditional societies in Southern Africa, and which undergirded the remarkably peaceful transition in South Africa from Apartheid to democracy.”<sup>118</sup>

General consensus defines Ubuntu as “a traditional African philosophy that gives an understanding of us as human beings in relation to the rest of the world.”<sup>119</sup> According to Louw, “Ubuntu serves as the spiritual foundation of African societies.”<sup>120</sup> The Zulu word ‘Ubuntu’ directly translated means ‘humanness.’ The complete definition of this concept is notoriously difficult to put into words; as Nussbaum states, “Africa’s traditional culture is

<sup>117</sup> Tutu, Desmond: “The New World Order,” (*The International Foundation for Socio-Economic and Political Studies*, Moscow Conference: July 14<sup>th</sup> – 15<sup>th</sup>, 1992).

<sup>118</sup> Tutu, Desmond: “Reflections on adopting an Ubuntu way of life,” (The Tutu Foundation: [www.tutufoundation.org](http://www.tutufoundation.org)) p1.

<sup>119</sup> Suze Manda, David: “Ubuntu Philosophy as an African Philosophy for Peace,” ([www.africafiles.org](http://www.africafiles.org)).

<sup>120</sup> Louw, Dirk: “Ubuntu: An African Assessment of the Religious Other,” ([www.bu.edu/wep/Papers/Afri/AfriLouw.htm](http://www.bu.edu/wep/Papers/Afri/AfriLouw.htm)).

inaccessible because most of it is oral rather than written and lived rather than formally communicated in books or journals; it is difficult to learn about from a distance.”<sup>121</sup> A key figure, who many consider provides the most comprehensive explanation of Ubuntu, is Desmond Tutu: “[Ubuntu] speaks of the very essence of being human... It means my humanity is in caught up, inextricably bound up, in theirs. We say ‘a person is a person through other people.’ It is not ‘I think therefore I am.’ It says rather: ‘I am human because I belong.’”<sup>122</sup> Tutu explains how according to Ubuntu, the individual is defined by his relationship with his or her surrounding community, rather than by his or her own actions or achievements.

However, a complete understanding of Ubuntu cannot be gained by studying other peoples’ definitions, but rather by spending time within the cultures where it is ever present. Only then can you really grasp the meaning of this philosophy. During research trips to sub-Saharan Africa, on numerous occasions the researcher experienced the presence of Ubuntu, first hand. During one particular visit, various discussions were held with the families of victims of Apartheid crimes. They were asked how they were able to forgive and reconcile with those who had inflicted so much harm upon their loved ones. More often than not, they replied by saying that such sacrifices needed to be made for the betterment of their community and for their state to recover from what it had endured. It is possible to draw a clear link between this justification and the consequentialist argument which features as a justification for the application of restorative justices processes, throughout the final section of this chapter; both prioritise a positive outcome for the society.

Tutu takes this concept one step further by stating that the victims of Apartheid forgave their oppressors because they believed that they were also victims: “The humanity of the perpetrator of Apartheid’s atrocities was caught up and bound up in that of his victim whether he likes it or not... In the process of dehumanising another, in inflicting untold harm and suffering, the perpetrator was inexorably being dehumanised as well... I used to say that the oppressor was dehumanised as much as, if not more than, the oppressed.”<sup>123</sup>

That being said, throughout the research trips, no feelings of pity were detected during conversations with the victims of Apartheid, but rather a feeling that forgiveness was the best

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<sup>121</sup> Nussbaum, Barbara: “Ubuntu: Reflections of a South African on our Common Humanity,” (*Reflections*, Vol. 4, No. 4, 2003).

<sup>122</sup> Tutu, Desmond: “No Future without Forgiveness,” (London: Rider Press, 1999) p34-35.

<sup>123</sup> Tutu, Desmond: “No Future without Forgiveness,” (London: Rider Press, 1999) p35.

way of healing and reuniting one's community, as opposed to more destructive forms of retributive justice. These encounters demonstrate the critical contribution which Ubuntu can make towards transitional justice processes; encouraging the restoration of the humanity of both victim and perpetrator through forgiveness and reconciliation. The stark contrast between these behavioural patterns and the Western behavioural patterns with which the researcher is most familiar, makes the power and presence of Ubuntu all the more evident.

Throughout *'Ubuntu: Reflections of a South African on our Common Humanity,'* Barbara Nussbaum provides many examples which exhibit the presence of Ubuntu throughout African societies. Some examples of Ubuntu presented by Nussbaum, range from the exchanging of day-to-day pleasantries in Africa, the style of African leadership, and the way in which African wars are conducted. The first example may seem a little weak to an outsider, but to an African who embraces the Ubuntu philosophy, he or she shows genuine concern as to the welfare of his or her fellow human: "We are so connected that if you did not sleep well, or if you are not having a good day, how can I sleep well or have a good day?"<sup>124</sup> Ubuntu is also evident among African leaders who listen to the opinions of all of the people they serve and make decisions which reflect the overall consensus of this group. Finally, following the cessation of African wars, it is not uncommon for a 'cleansing ceremony' to be arranged, in order to cleanse the spirits of killers: "This mature, profound skill demonstrates an inbuilt capacity for reconciliation and healing after war."<sup>125</sup> This particular example demonstrates the impact which the Ubuntu philosophy could have on post-conflict reconciliation processes in Africa, by encouraging victims of human rights violations to forgive their oppressors for the greater good of their society. The fact that Nussbaum is herself a South African citizen, who has had first-hand experience of this philosophy, has evidently equipped her with a greater understanding of Ubuntu.

### Is Ubuntu Solely an African Philosophy?

There is also a general consensus among recent literature on the subject that Ubuntu is generally 'an African philosophy,' which is scarce among most non-African societies. This, according to Michael Battle, is because of the differing social characteristics that these

<sup>124</sup> Nussbaum, Barbara: "Ubuntu: Reflections of a South African on our Common Humanity," (*Reflections, Vol. 4, No. 4, 2003*).

<sup>125</sup> Nussbaum, Barbara: "Ubuntu: Reflections of a South African on our Common Humanity," (*Reflections, Vol. 4, No. 4, 2003*).

societies possess: “Ubuntu, the African concept of community embraced by Tutu, provides a corrective hermeneutic for Western salvation theology that focuses on the individual.”<sup>126</sup> Throughout *‘Reconciliation: The Ubuntu Theology of Desmond Tutu,’* Battle explains Tutu’s claim that the Ubuntu philosophy is incompatible with Western societies, because in the West, human society is defined by material possession: “Secular prosperity seduces us into judging others as if value were dependent upon the production of goods.”<sup>127</sup> This is labelled by Battle as ‘the dehumanisation of materialism.’<sup>128</sup>

To further explain this, Battle touches on the contrasting ways in which African societies and Western societies define ‘personhood,’ according to Tutu. In the West, he states that the definition of ‘personhood’ focuses on the individual and his or her actions and achievements. By contrast, African cultures define a person’s meaning in the context of his or her environment: “[In Africa] human community is vital for the individual’s acquisition of personhood.”<sup>129</sup> These varying definitions of ‘personhood’ clearly illustrate why reconciliatory processes may be more compatible within African societies. Put simply, by focusing less on the individual, and more on the future of humanity as a whole, the African people focus more on reconciliation and forgiveness and less on retribution.

Nussbaum also looks at the possibility of spreading the Ubuntu philosophy across the world to encourage non-African societies to think and act more in terms of the betterment of their communities rather than for individual empowerment, or as she puts it: “sprinkling Ubuntu on the consciousness of mankind.”<sup>130</sup> Tutu himself argues that this would not be possible in the West, due to its focus on material wealth and self-determination rather than the welfare of the collective. For these reasons, he argues that the Ubuntu philosophy is incompatible with modern capitalist societies.

Therefore, although those who see economic development as a positive step for a society, might see Africa’s underdevelopment as a shortcoming, it could be argued that this may indeed be the continent’s saving grace. Although it is likely that African communities have always been plagued by warfare, economic development has introduced these societies to new forms of conflict which stem from the desire for individual empowerment. Had

<sup>126</sup> Battle, Michael: “Reconciliation: The Ubuntu Theology of Desmond Tutu,” (Ohio: Pilgrim Press, 1999) p5.

<sup>127</sup> Tutu, Desmond: “General Secretary’s Report to National Conference of SACC,” June 25<sup>th</sup> – 29<sup>th</sup> 1984.

<sup>128</sup> Battle, Michael: “Reconciliation: The Ubuntu Theology of Desmond Tutu,” (Ohio: Pilgrim Press, 1999) p37.

<sup>129</sup> Battle, Michael: “Reconciliation: The Ubuntu Theology of Desmond Tutu,” (Ohio: Pilgrim Press, 1999) p38.

<sup>130</sup> Nussbaum, Barbara: “Ubuntu: Reflections of a South African on our Common Humanity,” (*Reflections*, Vol. 4, No. 4, 2003).



economic development not reached Africa, it is possible that the power and influence of Ubuntu there would be far greater than it is today. Either way, the preservation of the Ubuntu philosophy is essential to continue the spread of reconciliation and forgiveness across modern-day, post-conflict societies in Africa.

Given that the Ubuntu philosophy still maintains a strong presence throughout many transitional African societies and given its apparent incompatibility with Western states, why then are Western transitional justice frameworks consistently applied to assist with the political transitions of African states? Perhaps one immediate response to this important question would be that these aforementioned frameworks have been introduced by Western governments in an attempt to repair the damage caused by their previous foreign policy exploits. Though this might well be the case, this thesis recognises that although Ubuntu may not be compatible with Western capitalist societies, Western transitional justice frameworks can build upon the principles of this powerful African philosophy; Ubuntu embodies and stimulates the processes which make reconciliation possible.

### **Reconciliation in the Absence of Ubuntu**

In order for transitional and post-conflict societies to adequately accommodate truth commission enquiries, it is clear that a pre-existing commitment to justice must be present or at least retrievable. When examining African societies, it is often the case that the Ubuntu philosophy provides this. However, as previously discussed, this is usually only an African-based philosophy. Therefore, suitable substitutes need to be found within non-African societies. In some cases as Philpott has already demonstrated, religion may play a key role in reinforcing this commitment and laying the foundations for transitional justice mechanisms. However, in other instances, religious influences may also be lacking, or may be counterproductive; on these occasions equivalent forces which embody this commitment to justice must be found. That being said, it is by no means the case that in such circumstances truth commissions should not be considered, but that the expectations placed upon these commissions should be scaled down significantly.

## Potential Problems with Reconciliation Processes

In addition to the many benefits of reconciliation processes, it should also be noted that there are also negative attributes which accompany these processes. These are as follows:

1. As Bloomfield argues, it is impossible to design a 'one-size-fits-all' reconciliation process – the problems faced by different transitional states vary significantly; those who believe that the South African reconciliation process is suitable for any post-conflict situation are mistaken. Reconciliation processes need to be tailor-made for the society in which they are introduced: "As every conflict is different, and every democratic settlement is different, so a reconciliation process will differ from all others in important respects, even if it shares many similarities with them."<sup>131</sup> This means that reconciliation processes often take much time and effort to develop.
2. Despite their potential, reconciliation processes are often viewed with cynicism and negativity by victims of human rights violations who consider truth commissions and reconciliation processes to be 'second best'<sup>132</sup> options for societies where criminal justice is not possible: "The rhetoric of reconciliation is particularly common in situations where traditional judicial responses to wrongdoing are unavailable because of corruption in the legal system, staggeringly large numbers of offenders, or anxiety about the political consequences of trials and punishment."<sup>133</sup> As will be discussed in the next section, this is a common misconception which severely damages the reputation of reconciliation processes. Truth commissions should not be seen to replace justice, but as mechanisms which promote restorative justice.
3. The final criticism is that there are some societies and cultures with which reconciliation processes are simply not compatible. As Dwyer stresses in '*Reconciliation for Realists*,' reconciliation has powerful overtones and benefits from the attributes promoted by certain religions. However, certain cultures and religions can also directly clash with the concept of reconciliation and the commitment and sacrifices it requires. Therefore truth commission architects need to assess whether or

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<sup>131</sup> Bloomfield, David: "Reconciliation after Violent Conflict: A Handbook," (Stockholm: International Institute for Democracy and Electoral Assistance, 2005) p16.

<sup>132</sup> Dwyer, Susan: "Reconciliation for Realists," (*Ethics and International Affairs*, Volume 13, Issue 1, March 1999) p82.

<sup>133</sup> Dwyer, Susan: "Reconciliation for Realists," (*Ethics and International Affairs*, Volume 13, Issue 1, March 1999) p82.

not reconciliation processes will be compatible with specific religions and cultures within their societies.

## **Conclusions**

Reconciliation is a highly complex phenomenon which needs to be properly understood prior to its application by transitional governments. These governments need to understand the following:

1. Reconciliation should be considered as both a long-term 'process' and an 'end product.'
2. Reconciliation cannot be enforced by state action, though effective 'macro-level' policies, such as the introduction of transitional justice bodies, can encourage it. Instead, reconciliation will occur when individuals ('micro-level') feel ready to peacefully co-exist once again alongside their former oppressors. Micro-level reconciliation can be facilitated by grassroots civil society groups and religious belief systems.
3. An understanding of the different stages of reconciliation and of the varying consequences of past state violence will help governments comprehend what policies they can implement and when, to assist this process.
4. Truth, justice, forgiveness and healing can contribute towards the reconciliation process to varying degrees; this will entirely depend on the circumstances and context faced by the state in question.
5. The presence of a 'commitment to justice' will assist with the development of successful reconciliation processes in transitional and post-conflict societies. This commitment can be promoted by pre-existing religions and philosophies.
6. Finally, reconciliation processes are not compatible with all societies and cultures. It is essential that governments assess the relative merits and pitfalls of the reconciliation processes within their particular context, prior to a truth commission's establishment.

What cannot be denied is the substantial impact differing reconciliation processes have had on past and present transitional and post-conflict societies. If successful, these reconciliation

processes, often promoted by truth commissions, can reunite people previously in conflict and promote peace when the reoccurrence of further conflict appears inevitable.

### C. Justice

"If empowered properly, commissions can help to fill some of the state's obligations under international law to respond to human rights abuses."<sup>134</sup> As Hayner stresses here, truth commissions can be employed by transitional governments as a direct response to gross violations of human rights. As mechanisms of restorative justice though, truth commissions do not provide traditional forms of retributive justice in response to these violations. Instead, they seek to establish the truth and formally acknowledge human rights violations in the hope of achieving reconciliation and returning societies to peace.

Such an approach attracts much criticism among groups who believe that those guilty of human rights violations should be tried and punished in accordance with international law. Furthermore, said critics believe that truth commissions are only employed because the states in question do not have the means or resources necessary to punish the guilty. Truth commission advocates argue that the first task is to dispel this myth: "Non-judicial truth bodies do not and should not be seen to replace judicial action against perpetrators, and neither victims nor societies at large have understood them to do so in those countries where truth commissions have been put in place."<sup>135</sup> In fact, as these experts will testify, truth commissions can adapt to work alongside judicial mechanisms and assist them through the provision of evidence which can lead to successful prosecutions: "A truth commission can most directly strengthen trials through its vast collection of information pertaining to crimes, which can be forwarded directly to persecuting authorities."<sup>136</sup>

As a result of the mixed feelings which arise from the introduction of truth commissions in response to human rights violations, a fierce debate emerges between those in favour of enforcing retributive justice and those in favour of the introduction of truth commissions (restorative justice) within these societies. The strengths and weaknesses of each case are explored below.<sup>137</sup> Whilst highlighting the differences between the two forms of justice, this

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<sup>134</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p105.

<sup>135</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p88.

<sup>136</sup> Hayner, Priscilla B: "Unspeakable Truths: Facing the Challenge of Truth Commissions," (London: Routledge, 2002) p102.

<sup>137</sup> This is an expanded/developed version of the Retributive v Restorative Justice debate which formed part of my MA International Relations Thesis (Crowcombe, Matthew: "Post-Apartheid South Africa: 'Amnesty in South Africa's Truth and Reconciliation Process,'" (Swansea University: MA International Relations Thesis, October 15<sup>th</sup> 2007).

section will demonstrate the ways in which truth commissions can help promote restorative justice within transitional and post-conflict societies. It will also highlight the inadequacies of the retributive approach to transitional politics. This debate will also address the issue of whether or not the prioritisation of restorative justice is in some important sense immoral in transitional contexts, with specific reference to the application of comprehensive amnesty processes.

### **The Case for 'Retributive Justice'**

Retributive justice is a specific type of justice which deems that it is morally acceptable for a state to issue proportionate punishment to individuals responsible for the orchestration of specific crimes: "The state determines blame and administers pain in a context between offender and the state directed by systematic rules."<sup>138</sup>

A key issue discussed by Robert Rotberg in *'The Morality of Truth Commissions,'* is the question of whether it is morally right that those responsible for punishable crimes should go unpunished. This argument arises as a direct criticism of the restorative approach which often results in the introduction of various forms of amnesty, preventing the punishment of guilty parties, in the interest of promoting future peace and stability. Rotberg argues that the introduction of amnesty by governments pursuing the restorative approach prevents justice from being served: "[retributive] Justice is not achieved when a murderer or rapist publicly acknowledges his crimes but is not brought to trial and suffers no further punishment."<sup>139</sup> This is the most common criticism of the restorative justice; it is, in some sense, morally wrong and unjust for individuals who have admitted to breaking the law and to violating the basic human right of others, to go unpunished. It argues that the sole pursuit of the restorative approach would entirely bypass criminal justice procedures, which would, in any other situation, be fully enforced.

Other retributive justice advocates would argue that by letting those who have violated individuals' basic human rights go unpunished, governments are not adequately protecting

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<sup>138</sup> Villa-Vicencio, Charles and Doxtader, Erik: "The Provocations of Amnesty," (Claremont: Africa World Press, 2003) p35.

<sup>139</sup> Rotberg, Robert I.: "The morality of Truth Commissions – Truth v Justice," (Oxford: Princetown Uni Press, 2000) p25.

the rights of their citizens: "The crimes of Apartheid constitute an affront to the basic democratic principle of treating all adults as free and equal citizens... A post-Apartheid state that forgave these crimes could not credibly claim to be committed to the most basic democratic principles."<sup>140</sup> This suggests that there may exist a direct clash between the characteristics of restorative justice processes and some of the fundamental principles promoted by democratic states, as Rotberg suggests with reference to the introduction of amnesty in democratic Post-Apartheid South Africa.

Dumisa Ntsebeza argues, with particular reference to Post-Apartheid South Africa, that in order to promote the restoration of law and order, the enforcement of retributive justice is fundamental in societies in transition from authoritarian regimes: "In South Africa the lesson needs to be spelled out that what we witnessed under Apartheid was criminal behaviour. And it is here that criminal prosecutions will serve to restore the legal order and reassure the South African community that Apartheid was a crime against humanity."<sup>141</sup> He argues that the actions taken by the newly appointed governments of recently established democratic states have serious implications for the future conduct of their citizens. Should past crimes go unpunished then the citizens of these societies may begin to believe that such conduct is condoned by the new government; a consequence of this may be the recurrence of similar crimes in the future. Governments need to make an example of wrongdoers to demonstrate that human rights violations will not be tolerated; restorative justice, it is suggested, fails to achieve this.

In response, Xolela Mangcu argues that this is a common misconception "based on a conflation of political and legal considerations."<sup>142</sup> She states that authoritarian regimes are primarily political and should therefore be dealt with politically and that legal action is not necessarily the solution to avoiding the reoccurrence of such regimes. Instead she argues that the remedies should be more socio-economic than legal. Mangcu also highlights what she describes as another incorrect assumption. She criticises the common belief shared by those in favour of the retributive approach, that the punishment of perpetrators is an essential part of the healing process of all victims, irrespective of their colour or culture. Instead, Mangcu argues that in fact, among the black communities, "prosecution plays a relatively minor role"

<sup>140</sup> Rotberg, Robert I.: "The morality of Truth Commissions – Truth v Justice," (Oxford: Princetown Uni Press, 2000) p31.

<sup>141</sup> (Ntsebeza, Dumisa) Villa-Vicencio, Charles and Doxtader, Erik: "The Provocations of Amnesty," (Claremont: Africa World Press, 2003) p20.

<sup>142</sup> (Mangcu, Xolela) Villa-Vicencio, Charles and Doxtader, Erik: 'The Provocations of Amnesty,' (Claremont: Africa World Press, 2003) p29.

in the healing process.<sup>143</sup> She claims that macro-level retribution processes are of more benefit to the restoration of the state than the individual, and that micro-level restorative justice initiatives will better assist healing processes within the black communities. Similar views have been reiterated by the architect of the South African TRC, Desmond Tutu. Mangcu's argument supports the claims made in the previous section of this chapter, that micro-level reconciliation is more likely to be achieved in African cultures, due to their pre-existing communitarian religious and philosophical belief systems; the healing processes of such communities do not always require the inclusion of comprehensive criminal justice practices.

In *'An Ethic for Enemies,'* Donald Shriver argues that revenge is a natural reaction, and can be considered a common characteristic of the human race. Therefore, by punishing the guilty, the state is acting on behalf of victims to ensure that they do not seek revenge by their own actions. In doing so, the state is also recognising the victims' human rights, which critics argue are ignored by the restorative approach: "Anger, resentment, even moral hatred are appropriate in certain circumstances. These sentiments often give expression to the victim's struggle for self-respect and self-worth."<sup>144</sup> In this way many believe it to be the duty of the state to honour the retribution or justice owed to the individual whose individual rights have been violated: "What is important is to ensure that society gives the victim equal status to everyone else. This means readdressing the implied imbalance of human worth between perpetrator and victim."<sup>145</sup> One way to achieve this is to impede the freedom of the perpetrator to readdress the imbalance between himself and his victim; retributive justice seeks to achieve exactly this. Critics of this process would argue that "there is little evidence that retributive justice achieves anything more than a short-term need for revenge;"<sup>146</sup> therefore it is not ubiquitous in every society and not a practical solution as it contributes little towards the restoration of long-term peace.

Throughout *'Radical Evil on Trial,'* Carlos Nino argues it is only fair that a penalty should be paid for violating the rules of co-existence. In support of this argument he explores the concept of a 'social contract' which is shared between citizens of all societies to promote and

<sup>143</sup> (Mangcu, Xolela) Villa-Vicencio, Charles and Doxtader, Erik: 'The Provocations of Amnesty,' (Claremont: Africa World Press, 2003) p27.

<sup>144</sup> Shriver, Donald: "An Ethic for Enemies," (Oxford: Oxford Uni Press, 1995) p35.

<sup>145</sup> Villa-Vicencio, Charles and Doxtader, Erik: "The Provocations of Amnesty," (Claremont: Africa World Press, 2003) p40.

<sup>146</sup> (Lyster, Richard) Villa-Vicencio, Charles and Doxtader, Erik: "The Provocations of Amnesty," (Claremont: Africa World Press, 2003) p186.



maintain the common good of their society. If this 'communal responsibility'<sup>147</sup> is broken, Nino argues that it is the state's duty to prevent further breaches of this social contract by punishing those responsible.

Villa-Vicencio argues that where perpetrators have been unwilling to take responsibility for their actions, retributive justice is essential in order to restore basic moral order to the state in question. Morality plays a key role in the promotion of peace throughout multi-racial societies. Where this moral order is weakened, so too will the bonds between different races and cultures. What results is the development of a system such as that which haunted Apartheid South Africa for many years. Therefore, as Villa-Vicencio argues, the maintenance of morality within societies is essential to ensure the promotion of peace between individuals from different races and cultures.

It is clear from this analysis that the retributive approach carries with it many strengths and weaknesses. Its strengths are demonstrated by its commitment to protect the rights of its citizens and fulfil a state's obligations under international law. Its weaknesses are highlighted by its frequent inability to assist different cultures with their restoration processes and their return to peace and social, political and economic stability.

### **The Case for 'Restorative Justice'**

An alternative to retributive justice which, in recent years, is more commonly pursued by truth commissions is that of Restorative Justice: "Political Restorative Justice for societies in transition involves negotiating a way through the ambiguities inherent to political transition from oppressive, autocratic rule to the beginning of democracy."<sup>148</sup> Restorative Justice assists the transition to democracy without seeking revenge on behalf of the victims of the previous regime. Restorative justice proved to be a key component of South Africa's Truth and Reconciliation Process: "The Interim Constitution (Act 200 of 1993) commits the nation to a secure foundation for the people of South Africa to transcend the divisions and strife of the past which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt, and revenge. These can now be addressed on the basis that there is a need for understanding but not vengeance, a

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<sup>147</sup> Nino, Carlos: "Radical Evil on Trial," (New Heaven: Yale University Press, 1996) p160.

<sup>148</sup> Villa-Vicencio, Charles and Doxtader, Erik: "The Provocations of Amnesty," (Claremont: Africa World Press, 2003) p31.

need for reparation but not retaliation, a need for Ubuntu but not victimisation.”<sup>149</sup> An analysis of the positive and negative attributes of restorative justice processes will allow us to gauge the relative strengths and weaknesses of the forms of justice promoted by truth commissions in response to gross violations of human rights.

As this chapter has discussed, it is necessary to understand how important acknowledgement of the truth is for those living in ignorance over past atrocities. Restorative justice promoted by truth commissions brings truth to the people who need it most: “The truth... is... much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth and nothing but the truth with the incentive that they will not receive punishment.”<sup>150</sup> For many, acknowledgement of the truth is, in itself, a form of justice. To be able to speak aloud about the atrocities they have had to endure for so long, and to have an individual or a group of individuals admit their responsibility for these acts is often what is required for victims to move on and begin to deal with their troubled pasts: “Some victims and family members of those killed say that just having the full truth publicly told can provide some sense of justice.”<sup>151</sup> Acknowledgement in itself can be an important part of the healing process.

The restorative approach also assists the restoration of relationships in socially fractured societies. This is achieved through the promotion of both ‘micro’ and ‘macro’ level reconciliation processes; these processes are discussed in the truth and reconciliation sections of this chapter. Villa-Vicencio argues that communication plays an important role here: “We need to learn to speak to one another after generations of rebuke and confrontation... Only this ‘deep conversation’ can lead to the kind of united action that it will take to build a lasting democracy.”<sup>152</sup> The sole pursuit of retributive justice ignores the importance of repairing social divisions when repairing the social fabric of post-conflict societies.

When focusing specifically on the amnesty aspect of restorative justice, critics like Aryeh Neier argue that “[amnesties] create a culture of impunity that only encourages further human rights violations.”<sup>153</sup> There is much evidence throughout history to support such a claim.

<sup>149</sup> Villa-Vicencio, Charles and Doxtader, Erik: “The Provocations of Amnesty,” (Claremont: Africa World Press, 2003) p31.

<sup>150</sup> Boraine, Alex: “A Country Unmasked,” (Oxford: Oxford University Press, 2000) p287.

<sup>151</sup> Hayner, Priscilla B.: “Unspeakable Truths – Facing the Challenges of Truth and Reconciliation Commissions,” (London: Routledge, 2002) p106.

<sup>152</sup> Villa-Vicencio, Charles and Doxtader, Erik: “The Provocations of Amnesty,” (Claremont: Africa World Press, 2003) p43.

<sup>153</sup> Neier, Aryeh: “Brutality, Genocide, Terror and Struggle for Justice,” (New York: Times Books, 1998) p103.

President Fujimori of Peru, for example, legalized impunity through the continual granting of amnesties to pardon gross human right violations carried out by his death squads including the massacres of Barrios Altos and La Cantuta.<sup>154</sup> As a consequence he created a culture which effectively condoned violence and murder, without accountability. Similarly, the pardoning of Hutu crimes against Tutsi elites in Rwanda acted as a prelude to the 1994 genocide. However, it is a common misconception that all amnesties create cultures of impunity, as there are sometimes conditions put forward which must be fulfilled before conditional amnesty is granted. If we refer once again to the South African example, we can see that in fact the perpetrators had to pay a considerable price for amnesty: "Public shame, personal alienation and familial rejection should not be dismissed as insignificant."<sup>155</sup> The resulting disgrace and humiliation that these individuals had to endure was considered, by many, to be punishment enough: "Where justice is unlikely in the courts, a commission plays an important role in at least publicly shaming those who orchestrated the atrocities."<sup>156</sup> As a consequence of admitting their guilt, these individuals are often alienated from their societies; there are numerous stories told of individuals who, despite being granted amnesty, failed to gain forgiveness from their loved ones and became in many instances, social outcasts.

Furthermore, individuals and groups are often subjected to further requirements prior to the acceptance of their amnesty applications. In post-Apartheid South Africa, those applicants who qualified for amnesty were required to pay their victim's reparations payments, which were designed to financially compensate them for the economic hardships they had been forced to endure. This concept is very much in-keeping with the United Nations Declaration of Human Rights which promotes "the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms."<sup>157</sup> It is argued that justice is being served on some level, through the fulfilment of these conditions. Such conditions are only present in certain instances; for not all governments or truth commissions are able to enforce the payment of reparations, and reparations are seldom enforced to the appropriate scale. In addition, such requirements are entirely absent in states where 'blanket

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<sup>154</sup> Laplante, Lisa J: Outlawing Amnesty: "*The Return of Criminal*

*Justice in Transitional Justice Schemes*," (*Virginia Journal of International Law*, Vol. 49:4, 2009) p944.

<sup>155</sup> (Bizos, George) Villa-Vicencio, Charles and Doxtader, Erik: "The Provocations of Amnesty," (Claremont: Africa World Press, 2003) p7.

<sup>156</sup> Hayner, Priscilla B: "Unspeakable Truths – Facing the Challenges of Truth and Reconciliation Commissions," (London: Routledge, 2002) p132.

<sup>157</sup> The United Nations: '1985 Declaration of Basic Principles of Justice for Victims of Gross Violations of Human Rights and Fundamental Freedoms,' available at: [http://untreaty.un.org/cod/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf) (last viewed: March 18<sup>th</sup> 2012).

amnesty' is imposed; the perpetrators in question are allowed to get away without punishment.

However, it is also important to note, that although in many cases these perpetrators go unpunished by the state, many believe that the psychological effects of their actions can prove to be extremely punishing; though this will of course depend on the conscience and moral standards of the perpetrator. Humans are often unable to cope with such experiences, and frequently the resulting guilt and self-torture proves to be extremely damaging for those responsible.

In response to the argument that restorative justice is immoral, and sacrifices the demands of justice, Rotberg introduces the realists' approach: "Some Realists argue that because the injustices were so widespread and systematic, it is not practical to persecute individuals for their crimes."<sup>158</sup> It is evident that the most important word here is 'practical.' When deciding upon the most appropriate course of action to encourage the reconstruction and democratization of their societies, newly formed governments need to consider their state's political, social and economic pre-conditions. If, for example, a transitional government is looking to establish a judicial process to punish perpetrators of past human rights violations, it will first need to consider whether or not it has the funding and resources available for this to be possible; in many instances it is often highly likely that the transitional government will also be heavily dependent up the commitment of the international community for this support. If funding and resources are available, it also will be necessary for this government to guarantee the impartiality of the judicial bodies overseeing this process. It is not uncommon for corrupt judicial infrastructures to survive the transition process; such bodies should not be involved in post-conflict criminal justice proceedings. In addition, due to the high cost of such processes, it is often the case that these funds could be better invested in economic initiatives which promote restorative justice; such decisions will depend on what is both possible and necessary to help rehabilitate the society in question.

Other supporters of the restorative approach argue that it would not be morally right to punish individuals for enforcing the ideologies of a political regime; instead they pin the blame on the ideology itself. In these situations it is argued that the acts referred to here were not carried out under the free will of the individual; rather the individual was obeying the orders

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<sup>158</sup> Rotberg, Robert I.: "The morality of Truth Commissions – Truth v Justice," (Oxford: Princetown Uni Press, 2000) p26.

of a higher command in order to fulfil a political objective. Amnesty was granted to perpetrators of Apartheid crimes in South Africa according to this belief. This system works under the premise that the crime would not have been committed if the orders were not made; now that the regime has been removed, it is unlikely that the perpetrator will reoffend. It is often also the case that the crimes committed by the perpetrators in question were not against the law when they were carried out; legislation in Apartheid South Africa for example, legalised racial segregation. Though there are apparent strengths to these claims, they do ignore the long-term effects which these actions can have upon the perpetrator; it is likely that long-term indoctrination can increase the chances that the individual will reoffend, even after the cessation of the regime. The likelihood of this eventuality needs to be assessed prior to the granting of amnesties.

Rotberg provides a counter-argument to the claim that restorative justice and amnesty processes are incompatible with democracies, by suggesting that they do promote 'Democratic Reciprocity.' In other words as Lawrence Becker puts it, the amnesty process is 'making a proportionate return for the good received.'<sup>159</sup> It does this by attempting to create social stability, a quality absent in many turbulent societies. Should amnesty processes achieve their goals and in doing so promote democratic reciprocity, it can be argued that in fact they are acting justly even though they are not bringing the perpetrators responsible to justice: "Because this kind of exchange is in itself a form of justice, a truth commission that strives for reciprocity directly addresses the challenges posed by the sacrifice of other kinds of justice."<sup>160</sup>

The final report published by the South African TRC demonstrates the prioritization of justice through democratic reciprocity over criminal justice proceedings. It is argued that democratic reciprocity can be further promoted by the process of amnesty, should it be open to debate by citizens from all areas of the society in question. The South African amnesty process was accredited for its all-inclusive approach which helped promote democratic reciprocity. The same commission was also commended for its assessment of each individual case for amnesty, as opposed to granting 'Blanket Amnesty' as other states, in similar situations, have done. By doing this it both respected the rights of its individuals, and promoted a more thorough truth-seeking process. Truth commissions which look to pursue

<sup>159</sup> Becker, Lawrence C: "Reciprocity" (London: University of Chicago Press, 1986) p72-144.

<sup>160</sup> Rotberg, Robert I: "The morality of Truth Commissions – Truth v Justice," (Oxford: Princetown Uni Press, 2000) p37.

both truth and justice stand the best chance of both promoting democratic reciprocity and of creating a stable and democratic future on behalf of their state.

### **The Prioritisation of Restorative Justice Processes is Morally Justified: ‘The Consequentialist Argument.’**

Despite their rapid proliferation, it has become clear that truth commission enquiries and the restorative justice processes they embody are not always well-received by the societies in which they are established. Critics often argue that by opting for restorative justice processes, states are ignoring their obligations under international law and the rights of the individuals they claim to represent. These criticisms were experienced first-hand by the researcher when discussing the possible implementation of restorative justice processes in a transitional Zimbabwe, with the victims of Mugabe’s regime; many of whom felt that anything but a criminal prosecution process would be unjust and immoral. Similar claims were also voiced upon the creation of the South African Truth and Reconciliation Commission in 1995. Such criticisms lead to one inevitable question; is the prioritisation of the establishment of restorative justice over retributive justice processes morally justified?

The contributions of thorough and effective criminal justice processes detailed by Rotberg, Ntsebeza, Shriver, Nino and Villa-Vicencio throughout ‘The case for retributive justice’ are clear. Some of these arguments suggest that the implementation of retributive justice processes are required to fulfil a state’s moral obligation to punish those guilty of committing human rights violations, and defend the rights of its citizens. Others suggest that retributive justice is an essential requirement when restoring a society’s basic moral order. Despite advocating the restorative justice approach, this thesis does not dispute the validity of these claims; retributive justice, where possible, can assist with the restoration of law and order of transitional and post-conflict societies.

‘The case for restorative justice’ also presents strong arguments which show how effectively implemented restorative justice initiatives can assist the restoration of transitional and post-conflict states through the promotion of truth and both ‘macro’ and ‘micro’ levels of reconciliation. Justifications for the implementation of amnesty processes are also presented here, along with counter-arguments which claim that blanket amnesties in particular ignore

an individual's right to accountability and justice. These claims are also not under dispute; it is clear that the implementation of amnesty processes can impede upon the fundamental rights of specific individuals and groups.

However, the definitive claim which settles this debate and justifies the prioritisation of restorative justice processes is the consequentialist argument. In the context of the retributive/restorative justice debate, the consequentialist argument, which takes a similar approach to Rotberg's democratic reciprocity argument, contends that although the restorative approach does ignore some of a state's moral obligations and often fails to promote some of the basic rights of specific individuals and groups, these policies are morally justified in the pursuit of the restoration of the society as a whole; the end justifies the means: "Politics is the arena in which such dilemmas can take their most dramatic form, though they appear in all areas of life, wherever doing what is best overall, requires the committing of a wrong, or the violation of a right."<sup>161</sup> If the consequences of the restorative approach result in the reintegration and stabilisation of a transitional society then the absence of retributive processes is morally justified.

The consequentialist case is strengthened by the aforementioned inability of the sole pursuit of criminal justice processes to promote the long-term restoration of fractured societies. As a process, it may fulfil specific requirements, such as the punishment of guilty parties, and the protection of individual rights, but it should be considered fundamentally inadequate when promoting processes of political, social and economic stabilisation; such procedures are better accomplished by the application of the comprehensive restorative justice initiatives presented by this thesis.

Further explanation of this argument can draw reference to the South African TRC's conditional amnesty policies which caused a significant uproar among the victims of the regime. Upon winning the 1994 elections, the newly instituted ANC government was faced with the difficult decision of how to best stimulate the development of a stable, united and peace-loving South African society. In these situations, it is sometimes suggested that the most natural course of action would be to pursue a Nuremburg style trial process and convict those responsible. However, the ANC knew that as well as being financially draining, this might also damage an already fragile peace process, whilst the alternative restorative justice

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<sup>161</sup> Lukes, Steven: "Moral Conflict and Politics," (Oxford: Clarendon Press, 1991) p8.

approach could be interpreted as failing to uphold the rights of the victims of the regime: "If the ANC had insisted on Nuremburg-style trials for the leaders of the Apartheid government, there would have been no peaceful transition to democracy."<sup>162</sup> Such a situation can be described as a 'moral conflict,' defined here by Steven Lukes: "Moral conflicts are conflicts between moral claims that may face persons or groups or communities or governments representing them, when individually or collectively they deliberate about what to do."<sup>163</sup>

By choosing to introduce the TRC and implement a comprehensive amnesty process, the ANC leadership decided that the course of action which would best promote peace and reconciliation in South Africa would be the introduction of restorative justice processes. This decision can be deemed as an act which ignored specific human rights of South African citizens (e.g. Article 8 of the Universal Dec of Human Rights<sup>164</sup>), in the interest of promoting the greater good; a peaceful transition to democracy in South Africa. The consequentialist argument states that these policies are morally justifiable because of their anticipated positive consequences.

Despite being morally justifiable, in order to address some of the criticisms voiced previously by amnesty critics, it is necessary, where possible, for a state to formally acknowledge any obligations not fulfilled by this course of action. For example, it should acknowledge that by implementing an amnesty process, it has ignored some of the basic human rights of its citizens, which otherwise should have been protected. The citizens of transitional societies need to understand that future human rights violations will not be dealt with in this manner and that traditional judicial practices will be reinstituted to punish future crimes, following the completion of the amnesty processes; this is to help prevent the manifestation of a culture of impunity.

In response to the initial question: 'is the prioritisation of the establishment of restorative justice over retributive justice processes morally justified,' this thesis argues that the prioritisation of restorative justice processes is morally justified if it is decided that the implementation of these practices will have a greater impact in the pursuit of just and peaceful societies.

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<sup>162</sup> Goldstone, Richard: "Justice as a Tool for Peace-making," (*The Hauser Lecture*, New York: New York University, 1997).

<sup>163</sup> Lukes, Steven: "Moral Conflict and Politics," (Oxford: Clarendon Press, 1991) p5.

<sup>164</sup> The United Nations: "The Universal Declaration of Human Rights," Available at: <http://www.un.org/en/documents/udhr> (Last accessed June 22nd 2011).



## Conclusions

The opening chapter of this thesis has provided a comprehensive analysis of the invaluable impact truth commissions and the transitional justice processes they facilitate, can have on transitional and post-conflict states: “A truth commission can make a critical contribution in the midst of a difficult transition, fundamentally changing how a country understands and accepts some of the most contentious aspects of its recent history.”<sup>165</sup> With reference to a growing pool of related literature, a greater understanding of these contributions has been developed through the examination of transitional justice and the different concepts it seeks to encompass; truth, reconciliation and justice.

It is clear that unearthing the truth behind past human rights violations, is an important part of most transitional justice processes. The importance of gaining an understanding of this concept and its different categorizations has been demonstrated here. The ability to adjudge the appropriateness of such a process is also essential; this chapter has shown that truth-seeking processes can also have negative implications for post-conflict states.

The complex concept of reconciliation, which is associated with most modern-day truth commissions, also requires identification and thorough analysis by future truth commission architects. With the assistance of Susan Dwyer, this chapter has introduced both ‘macro’ and ‘micro’ levels of reconciliation and their influence upon these healing processes. It has also looked at the different stages of reconciliation, the potential impact of political violence, and whether or not forgiveness is a requirement of this process. In addition, it sought to develop its own theories on the conditions which could help foster each of these levels of reconciliation, including the requirement of the existence of commitment to justice.

This chapter has also covered the retributive v restorative justice debate; a greater understanding of the positive and negative aspects of each form of justice and its influence upon transitional justice processes is also essential. This analysis has concluded that both retributive and restorative justice mechanisms should operate, where possible, in unison when assisting post-conflict societies.

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<sup>165</sup> Hayner, Priscilla B.: “Unspeakable Truths – Facing the Challenges of Truth and Reconciliation Commissions,” (London: Routledge, 2002) p23.

In addition to the above, this chapter has also demonstrated the importance of recognising a state's pre-existing political, social and economic characteristics; these will heavily influence the greater or lesser role played by the aforementioned concepts during each transitional justice process.

Each of the theories and concepts discussed throughout this chapter will be used as a point of reference when developing our truth commission frameworks in the penultimate chapter of this thesis, and when applying these frameworks to our Zimbabwe case study.

## **Chapter 2**

### **An Analysis of Previous Truth**

#### **Commission Investigations**

## **Introduction:**

“Through their hard-fought contributions to truth, justice, reparation, reform, and reconciliation, truth commissions have earned a justifiably privileged place in the arsenal of responses to mass atrocity.”<sup>1</sup>

Since the dawn of the transitional justice era, truth commission bodies have made an invaluable contribution towards the development of peace and reconciliation processes throughout post-conflict societies. However, there exists a common misconception surrounding the time span during which these mechanisms have existed. It is not uncommon for those less familiar with these transitional justice organs to believe that they are fairly new entities; the researcher recalls numerous conversations when it has been suggested that South Africa’s ‘Truth and Reconciliation Commission’ was the first of its kind. This of course is not true; the first truth commission was established in Uganda in 1974, more than twenty years prior to the inauguration of South Africa’s well-publicised TRC.

Since the establishment of Uganda’s ‘Commission of Enquiry,’ truth commissions have undergone a comprehensive evolutionary process, the culmination of which has seen them develop into versatile structures which can adapt to assist a wide array of different societies and cultures, each with contrasting political, social and economic preconditions.

Despite this evolutionary process, this chapter will show that even the most recently developed truth commissions remain far from flawless. Kenya’s ‘Truth, Justice and Reconciliation Commission’ for example, which was introduced in 2007, has received heavy criticism for allowing a vast array of amnesties to be granted for serious human rights violations, failing to protect witnesses and for excluding victims from the process.<sup>2</sup> The investigation of Paraguay’s ‘Truth and Justice Commission’ which eventually completed its work in August 2008, suffered from continual delays due lack of funding and poor government support.<sup>3</sup> Also, Algeria’s 2003 ‘Ad Hoc Inquiry Commission,’ suffered from poor communication and a distinct lack of government co-operation; victims also accused the

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<sup>1</sup> Freeman, Mark: “Truth Commissions and Procedural Fairness,” (Cambridge: Cambridge University Press, 2006) p40.

<sup>2</sup> Adow, Mohamed: “Kenya: Truth Commission’s Capacity Questioned,” (27<sup>th</sup> April 2011). Available at: [www.africanews.com](http://www.africanews.com) (Last accessed June 1<sup>st</sup> 2011).

<sup>3</sup> “Truth Commission: Paraguay,” (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-paraguay](http://www.usip.org/publications/truth-commission-paraguay) (Last accessed June 1<sup>st</sup> 2011).

government of bribing them to keep quiet.<sup>4</sup> These shortcomings should have been prevented after nearly 40 years of truth commission development.

On the other hand, recent commissions also provide much evidence of the successful evolution of truth commission bodies. Peru's 'Truth and Reconciliation Commission' is one of many recent commissions that has ensured its succession by a 'follow-up commission' which oversees the long-term implementation of the original commission's recommendations; prior to the introduction of follow-up commissions, there was no guarantee that recommendations would be implemented by the governments in question. More recent commissions are also developed with greater civil society consultation. National civil society groups were the main driving force behind the development of the mandate of Ghana's 'National Reconciliation Commission' for instance. The broader the input into the design of commission investigations, the more likely it is that the resulting inquiry will represent the interests of all the identity groups within each specific society.

Liberia's 'Truth and Reconciliation Commission' took this evolutionary process one step further, by including testimonies of the Liberian Diaspora within its investigation. Additionally, Germany's 'Truth Commission' permitted 'special votes' which allowed individual commissioners to voice their own opinions if they differed from the views of the majority of the commissioners.<sup>5</sup> Each of these additional practices demonstrates how the architects of modern day commissions are continually modifying their commission structures and operations to improve the impact they have upon the societies within which they operate.

The purpose of this chapter is to explore the ways in which the various concepts introduced by the opening stages of the thesis have been put into practice by past truth commission investigations. An examination of the successes and failures of these attempts is essential prior to the development of potential truth commission frameworks in the latter stages of the thesis.

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<sup>4</sup> "Ad Hoc Inquiry Commission in Charge of the Questions of Disappearances," (Justice in Perspective). Available at: [www.justiceinperspective.org.za/index.php?option=com\\_content&task=view&id=5&Itemid=10](http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=5&Itemid=10) (Last accessed June 1<sup>st</sup> 2011).

<sup>5</sup> Kritz, Neil J: "Transitional Justice: How Emerging Democracies Reckon with Former Regimes," (*United States Institute of Peace Press*, Vol.3, Laws, Rulings, and Reports, *Washington, DC*: 1995) p216-219.

## **Positive Aspects of Past Truth Commission Investigations:**

The first task therefore will be to discuss the positive impacts that truth commissions have had upon transitional states in recent history. Often when political scientists study the performances of past truth commissions they concentrate more on their failures than on the positive results achieved. It is for this reason that many people are unable to comprehend just what can be achieved by truth commissions if they are established and run effectively. The sheer magnitude of the tasks faced by most truth commissions must also be appreciated before they are subjected to condemnation by their critics: "Truth commissions are difficult and controversial entities; they are given a mammoth task and usually insufficient time and resources to complete it. They must struggle with rampant lies, denials and deceit and the painful, unspeakable memories of victims to uncover still dangerous truths that many in power may continue to resist."<sup>6</sup> Despite this, and despite the relative inexperience of those setting up truth commissions in recent history, it is pretty clear that they have achieved much since the dawn of the transitional justice era.

The positive aspects of past truth commission enquiries will now be examined:

### **1. Truth Seeking**

"If societies are to prevent the reoccurrence of atrocities and cleanse themselves of the corrosive enduring effects of massive injuries to individuals and whole groups, societies must understand – at the deepest possible levels – what occurred and why."<sup>7</sup> As introduced by Chapter 1, the first and possibly most significant characteristic of a truth commission is its ability to ascertain the truth about past events. As Rotberg expresses in the above quotation, finding out what happened and why, can be a critical part of the reconciliation process. It is only after finding out the truth about past atrocities that people can develop some sort of understanding as to why they occurred. There are numerous examples of conflicts re-occurring in recent history due to unresolved discrepancies over past events. There are also

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<sup>6</sup> Hayner, Priscilla B: "Unspeakable truths – Facing the Challenges of truth and Reconciliation commissions," (London: Routledge, 2002) p23.

<sup>7</sup> Rotberg, Robert I: "The Morality of truth commissions – truth v Justice," (Oxford: Princetown Uni Press, 2000) p3.

many examples of recent truth commissions successfully discovering the truth over past events and in doing so preventing the occurrence of further conflict.

South Africa's 'Truth and Reconciliation Commission' for example, established the truth behind long-kept Apartheid secrets by offering perpetrators amnesty in return for full disclosure of the truth of their involvement in proceedings. This was effective as it brought forward many guilty parties whom may have otherwise withheld their testimonies. It was so effective in fact that a study of the testimonies of those involved shows that often no details, no matter how upsetting or disturbing, were omitted: "The TRC's hearings could slice closer to the bone of terror and humanity in a way that the more limited commissions could not."<sup>8</sup> In this respect the ability of the TRC to establish the truth, stood as a benchmark for future truth commission investigations.

This capability has also been demonstrated by other commission enquiries. 'The Commission of Truth for El Salvador' for example, stated clearly in its mandate that as well as encouraging all of those either involved in or affected by the authoritarian regime to come forward and share their experiences, it would focus the majority of its attention on seeking the truth behind thirty-three specific cases.<sup>9</sup> Although this meant that it had to take its focus away from other cases, it did mean that it could ensure that it established the truth behind those atrocities which it considered to best represent the general pattern and characteristics of human rights violations which had occurred. Though some criticised its narrow mandate, others praised the Salvadoran Commission for knowing its limitations and focusing on specific, highly-influential cases, rather than attempting to investigate more than it was equipped to manage. Uruguay's 'Commission for Peace' took a similar approach and successfully established the truth behind the disappearance of thirty-eight individuals between 1973 and 1985; these findings were also formally acknowledged by the Uruguayan President.<sup>10</sup>

Other commissions such as the Chilean 'Truth and Reconciliation Commission' sought to present an authoritative historical account of past events within their final reports, in the hope

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<sup>8</sup> Rotberg, Robert I: "The Morality of truth commissions – truth v Justice," (Oxford: Princetown Uni Press, 2000) p6.

<sup>9</sup> "Report of the UN Truth Commission on El Salvador," (S/25500, April 1993). Available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html> (Last accessed June 1st, 2011), p18.

<sup>10</sup> "Uruguay: Peace Commission," (Justice in Perspective). Available at: [http://www.justiceinperspective.org.za/index.php?option=com\\_content&task=view&id=95&Itemid=170](http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=95&Itemid=170) (Last accessed June 1<sup>st</sup> 2011).

that it would encourage reconciliation processes to develop and lead to the eventual repairing of social divisions: “Only the knowledge of the truth will restore the dignity of victims... and in some cases make amends for the damage done.”<sup>11</sup> It sought to expose those involved in Pinochet’s oppressive regime and hold them accountable for their role in the violence and killings which were orchestrated following Pinochet’s coup of 1973. The commission also successfully helped the families of victims locate the whereabouts of their relatives. In a similar way, South Korea’s report entitled ‘*A Hard Journey to Justice*,’ presented its findings surrounding the suspicious deaths which occurred between 1975 and 1987.<sup>12</sup> Guatemala’s ‘*Memory of Silence*’ report successfully detailed the numbers of those killed, and information regarding those responsible.<sup>13</sup> This commission’s investigation even located a military log book which contained the names and information of persons unlawfully arrested, tortured and killed by a state security forces unit. Finally, Panama’s commission report documented information regarding the twenty-four gravesites it located in military buildings and prisons, during its investigation.<sup>14</sup>

These examples demonstrate the unique ability of truth commission investigations to uncover hidden truths surrounding past human rights atrocities. It is hoped that the truths revealed by these and other commissions will help fuel future reconciliation processes.

As discussed by Gready in Chapter 1, these truths can be presented by a commission in a number of ways; this will depend upon the objectives governed by the commission’s mandate, the type of information acquired and the characteristics of its intended audience.

## 2. Promoting Forgiveness and Reconciliation Processes

“And mercifully and wonderfully as I listened to the stories of victims, I marvelled at their magnanimity, that after so much suffering, instead of lusting for revenge they had this

<sup>11</sup> “Report of the National Truth and Reconciliation Commission,” (March 1991). Available at: <http://www.derechoschile.com/english/resour.htm> (Last accessed June 1st, 2011).

<sup>12</sup> “A Hard Journey to Justice: First Term Report 10.2000-10.2002,” (Seoul: Samin Books, 2004).

<sup>13</sup> “Guatemala: Memory of Silence,” (AAAS Science and Human Rights Data Centre) Available at: <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> (Last accessed May 23, 2011).

<sup>14</sup> Jackson, Eric: “Review of Panama Truth Commission Report.” (*NY Transfer News*, May 27, 2002). Available at: [http://www.blythe.org/nytransfer-subs/Covert\\_Actions/Review\\_of\\_Panama\\_Truth\\_Commission\\_Report](http://www.blythe.org/nytransfer-subs/Covert_Actions/Review_of_Panama_Truth_Commission_Report) (Last accessed May 23, 2011).



extraordinary willingness to forgive.”<sup>15</sup> As Tutu himself reaffirmed during the commencement of South Africa’s Truth and Reconciliation Commission, it was imperative that if anything was to be learnt from the whole process, it was that only through forgiveness and reconciliation could the people of South Africa learn to live together in harmony again.

As the previous chapter stated, forgiveness and reconciliation processes are extremely complex concepts, which are not easy to fully comprehend and even more difficult to operationalize within post-conflict societies. Various techniques are employed by modern-day truth commissions in an attempt to foster forgiveness and reconciliation processes.

One method, which was used to great effect by South Africa’s Truth and Reconciliation Commission, was the introduction of public hearings. By providing victims with a forum in which they could share their experiences, both with their oppressors and fellow citizens and by giving those responsible the opportunity to confess their involvement in past atrocities, the TRC helped South African society take its first steps towards reconciliation: “Victims told me that the hearings have enabled them to finally close the book on past tragedies... they are tired of bloodshed, they want to move on and rebuild their country.”<sup>16</sup> Since the airing of these public hearings on television screens throughout the world, increasing numbers of commissions have followed suit when addressing past gross human rights violations. It should be noted that this process was not without its critics, who doubted its long-term impact. Their claims are supported by various surveys which indicate that the general feeling, following the conclusion of proceedings, was that victims were still resentful and angry for the hardships they had had to endure: “Two-thirds of the public believed that revelations resulting from the truth commission process had made South Africans angrier and led to the deterioration between races.”<sup>17</sup> These results published by the South African Press Association demonstrate how difficult it is to accurately assess how affective the TRC’s public hearings have been in promoting reconciliation in South Africa. George Bizos responds to these criticisms in his essay entitled *‘Why Prosecutions are Necessary’* suggesting that the success of the TRC in encouraging the development of reconciliation should be judged on the absence of any follow-up conflicts since the fall of the regime; after decades of oppression and social unrest, South Africa has experienced a period of relative

<sup>15</sup> Tutu, Desmond: “No Future without Forgiveness,” (London: Rider Books, 1999) p76.

<sup>16</sup> Goodman, David: “Fault lines: Journeys into the new South Africa,” (University of California Press, London, 1999) p69-70.

<sup>17</sup> “Only Half the People Feel TRC is Fair and Unbiased: Survey,” (South Africa Press Association: March 5<sup>th</sup> 1998).

peace and prosperity since the conclusion of the TRC's investigation.<sup>18</sup> It is clear that if reconciliation proves to be a difficult process to foster, it is even harder to accurately assess its overall impact, as the South African case demonstrates.

Other techniques have also been adopted by truth commissions in an attempt to cultivate these processes. Following the completion of its public hearings, the 'Sierra Leone Truth and Reconciliation Commission,' for example, organised a number of reconciliation workshops in each major district. During these sessions those involved and affected by past human rights violations were encouraged to share their stories; guilty parties were even invited to talk and ask their communities for forgiveness. These sessions were supervised by community and religious leaders who actively encouraged the restoration of relations between victims and perpetrators and the development of micro-level reconciliation processes.<sup>19</sup>

Rwanda's 'National Unity and Reconciliation Commission,' set up 'solidarity meetings,' which aimed to discuss and bring about an understanding of the causes of its political conflicts: "It is time for the people of Rwanda to wake up and build a country with a firm foundation on unity and reconciliation... and to demonstrate to the world that it is not a nation of killers."<sup>20</sup> In addition this commission held 'National Summits on Unity and Reconciliation,' which were designed to "gather Rwandans from all walks of life and from abroad to engage in dialogue on how to foster unity and reconciliation in Rwanda."<sup>21</sup> This demonstrates the emphasis truth commission investigations place on the importance of communication throughout the implementation of transitional justice practices; they are designed to help and rehabilitate their people, it is therefore critical that they interact with them as much as possible throughout the process.

As Chapter 1 discussed, post-conflict governments can also develop macro-level reconciliation processes. East Timor's 'Commission for Reception, Truth and Reconciliation' encouraged the governments of Timor-Leste and Indonesia to put aside past disputes;

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<sup>18</sup> Bizos, George: "Why Prosecutions are Necessary," (Taken from: Villa-Vicencio, Charles and Doxtader, Erik: "The Provocations of amnesty," (Claremont: Africa World Press, 2003)) p196.

<sup>19</sup> Pettersson, Bjorn: "Post-Conflict Reconciliation in Sierra Leone: Lessons Learned," (Report prepared by *International IDEA for the Office of the High Commissioner for Human Rights (OHCHR)*, Geneva, November 2004) p13.

<sup>20</sup> NURC Member Elie Mpayinama – Taken from: Neier (University of Berkley War Crimes Centre).

<sup>21</sup> Moussalli (UNCHR, 21st March 2001, point 13).

consequently they established a 'Commission for Truth and Friendship' in December 2004.<sup>22</sup> This commission issued a report in July 2008, which formally acknowledged the responsibility of both governments; through leading by example, governments can often influence their societies to follow suit.

The Chilean Commission oversaw the construction of one version of its nation's past, which could be accepted by the entirety of its society, as a priority in assisting its reconciliation processes: "The Chilean Commission was based on the premise that creating a version of the past that was commonly held in society was a first step towards reconciliation."<sup>23</sup> In this way it was believed that a shared understanding could be developed between the victim and the perpetrator.

There is no instant solution/formula when attempting to re-unite and reconcile divided societies. The aforementioned techniques represent a few of the many practices utilised by modern-day commissions. The architects of future commissions could learn much from both the successes and failures of these attempts at fostering reconciliation processes.

### 3. Promoting Human Rights Laws

"Truth commissions can legitimise the culture, beliefs and values associated with human rights as the new framework for managing social relations"<sup>24</sup> Given that truth commissions were originally developed by Western states, it is hardly surprising that their mandates are generally geared towards the promotion of basic human rights throughout the countries in which they operate. Some commissions are so influential that they are able to effectively influence governments to reform their laws and constitutions to be more in keeping with human rights standards.

The UN backed 'Commission of Truth for El Salvador', went to great lengths to stress the importance of respecting individuals' basic human rights. The report published by the

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<sup>22</sup> "Truth Commission: Timor-Leste (East Timor)," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-timor-leste-east-timor](http://www.usip.org/publications/truth-commission-timor-leste-east-timor) (Last accessed June 1st 2011).

<sup>23</sup> Gairdner, David: "The Role of truth commissions in political transition in Chile and El Salvador," (*Chr. Michelsen Institute, Development Studies and human rights*, R 1998: 8) p52.

<sup>24</sup> Gairdner, David: "The Role of truth commissions in political transition in Chile and El Salvador," (*Chr. Michelsen Institute, Development Studies and human rights*, R 1998: 8) p51.

commission recommended various measures and reforms which could be implemented to better defend the basic human rights of the people of El Salvador.<sup>25</sup> The Chilean Commission also developed a series of recommendations and structural adjustments within its report for same purpose.

The South African TRC influenced the introduction of significant reforms to South African law which prevented its government from legalising the physical abuse of its citizens for political ends.<sup>26</sup> Through various redevelopment programmes, The African National Congress also introduced pieces of legislation which promoted the basic human rights of the nation's black majority and attempted to reintegrate them into South African society: "For blacks who make up 79% of the total populace of some 47 million, a new sense of freedom prevails."<sup>27</sup>

Argentina's 'National Commission for the Disappearance of Persons,' also prioritised the promotion of human rights laws in Argentina; a country where human rights laws had long been forgotten: "The human rights movement educated and transformed Argentine society in many important ways."<sup>28</sup> Within quick succession, the newly instituted President, Raul Alfonsin, introduced a series of rights based reforms, which were supported and promoted by international human rights organisations. These were also upheld by the truth commission, which worked alongside the media to ensure that guilty parties would be held accountable and such rights violations would not be repeated.

Paraguay's 'Truth and Justice Commission' created an 'Archive and Documentation Centre for the Defence of Human Rights.'<sup>29</sup> This was the first repository of its kind and worked to preserve evidence of past human rights violations, for future reference. Such operations can promote an understanding of past atrocities and can prevent their repetition.

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<sup>25</sup> "Report of the UN Truth Commission on El Salvador," (S/25500, April 1993). Available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html> (Last accessed June 1st, 2011).

<sup>26</sup> "Truth and Reconciliation Commission of South Africa Report," (21<sup>st</sup> March, 2003). Available at: <http://www.info.gov.za/otherdocs/2003/trc/> (Last accessed 1<sup>st</sup> June 2011).

<sup>27</sup> "If Only Adults Would Behave Like Children," (*The Economist*, 23<sup>rd</sup> April 2005) p29.

<sup>28</sup> Brysk, Alison: "The Politics of Human Rights in Argentina: Protest, Change and Democratization," (California: Stanford Uni Press, 1994) p680.

<sup>29</sup> "Truth Commission: Paraguay," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-paraguay](http://www.usip.org/publications/truth-commission-paraguay) (Last accessed June 1st 2011).

Indeed, the truth commissions of Chad, Ghana, Guatemala and Uruguay all highlighted the importance of the restoration of human rights, within their individual mandates; this demonstrates how highly truth commissions regard the endorsement of these core principles.

It is important to acknowledge that not all states recognise human rights laws and that truth commission bodies should not force such policies upon societies; this could be seen as an encroachment into the sovereignty of the states in question.

#### **4. Acknowledgement of Past Atrocities**

Modern day truth commissions place a great deal of emphasis on the importance of allowing victims to not only share their horrific experiences but to have them formally acknowledged either by their oppressors or by the state. When human rights violations occur over sustained periods of time without intervention, they often become part of the victim's everyday life to the point where it is difficult for a society to differentiate between right and wrong. Therefore, an integral part of the healing process is to grant victims the opportunity to share their experiences, and to express their long-term effects. This process breaks down the desensitisation which often occurs during sustained periods of oppression and helps victims express their emotions when for so long they have been prevented from doing so.

Rwanda's 'National Unity and Reconciliation Commission,' for example, was introduced in 1999 to try and appease the anger and tension which was felt by the victims of the genocide. Its commissioners recognised the importance of acknowledging victims' grievances and helped them regain their sense of human worth and dignity: "Should a truth and reconciliation commission be established, victims across the spectrum will have a credible and legitimate forum through which to reclaim their human worth and dignity; perpetrators, irrespective of persuasion and motivation, will have a channel through which to expiate their guilt."<sup>30</sup> Here Sarkin recognises that it is also important to give perpetrators the opportunity to talk about the crimes they have committed and to repent. It is often the case with post-genocide nations such as Rwanda, that victims are often also guilty of violating the rights of other individuals; such is the nature of genocide that often the victims were also at one stage

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<sup>30</sup> Sarkin, Jeremy: "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda," (*Human rights Quarterly* 21, 1999) p799.

the oppressors. When this is the case, it is even more essential that a forum be created for the benefit of both victims and perpetrators.

Other commissions such as the Ugandan ‘Commission of Inquiry into the Violation of Human Rights’ have taken similar measures to acknowledge the experiences of victims and perpetrators. As Quinn concisely puts it, the Ugandan Commission provided for “a process of active participation in which the wider community deliberates over past crimes, giving centre stage to both victim and offender in a process which seeks to bestow both dignity and empowerment upon victims... and when their crimes have been acknowledged, individuals and their communities can begin once again to form relationships with their neighbours and to participate in the social activities and civil structures of society, finally defeating deep routed conflicts which have served to paralyse that society.”<sup>31</sup>

In addition to the acknowledgement provided by public and private forums, similar ends can be achieved through the written recognition of the existence of past events. Truth commissions can achieve this by publishing a written acknowledgement of past atrocities within their final reports. Ideally these acknowledgements should be supported by a body of concrete, indisputable evidence, gathered during a truth commission’s investigation. As Chapter 1 discussed, with reference to Paul Gready, there are a number of ways in which truth commissions might wish to present this information depending on the political and social context and the specific objectives of the enquiry.

The report published by Ecuador’s ‘Truth Commission to Impede Impunity’ formally acknowledged that 456 individuals were victim to human rights violations (torture, sexual violence and execution) during President Leon Febres Cordero’s repressive campaigns against student and social movements between 1984 and 1988.<sup>32</sup> Similarly, East Timor’s ‘Commission for Reception, Truth and Reconciliation’ produced a comprehensive report which acknowledged that 102,800 Timorese deaths were attributed to the Indonesian occupation. The report itself declared the responsibility of some of the highest levels of government authority.<sup>33</sup> Also, Peru’s ‘Truth and Reconciliation Commission’ released an 8,000 page report in August 2003 which detailed the number of people affected and

<sup>31</sup> Quinn, Joanna: “An Analysis of Uganda’s Truth Commission,” (*YCISS Working Paper Number 19*, March 2003) p4.

<sup>32</sup> “Truth Commission Report: Ecuador 07,” (June 7<sup>th</sup> 2010). Available (in Spanish) at: <http://www.coverdad.org.ec/informe-final> (Last accessed 1st June, 2011).

<sup>33</sup> “The Commission for Reception, Truth and Reconciliation: Chega,” (October/November 2005). Available at: <http://www.cavr-timorleste.org/en/cheгаReport.htm> (Last accessed 1st June, 2011).

information regarding those responsible.<sup>34</sup> Each of the above examples demonstrates how truth commissions can promote accountability through the publication of detailed final reports.

A public acknowledgement that past crimes are wrong and that they will not be tolerated by future governments, is also important. This can result from the official endorsement of a truth commission's findings by a government representative; this occurred following the publication of Uruguay's 'Common for Peace' report.<sup>35</sup> In this instance the Uruguayan President formally acknowledged the commission report and established a 'follow-up commission' to ensure that its recommendations were implemented.

Public acknowledgement can also occur through a public apology, as Peru's President Toledo demonstrated in November 2003 when he publically apologised for the suffering of the victims of the civil war. This can have a positive effect on the willingness of victims to reconcile with their oppressors and with the state. These processes of acknowledgement have been encouraged by truth commissions in recent years.

## 5. Working Alongside other NGOs and Civil Society Groups

Another positive characteristic of truth commissions that has been demonstrated is their ability to work alongside other non-government organisations and civil society groups in the interests of promoting peace and democratic values. The commissions themselves have also benefited from the essential support provided by these groups. This support usually consists of the provision of funding and personnel or assistance with the supervision and running of commissions. This assistance is often vital to the success of truth commission operations. The expertise provided by NGO members and members of previous commissions also plays an integral role in both the construction and maintenance of truth commissions.

"Civil Society, particularly religious and community-based organizations, played a critical role in the reconciliation processes in Sierra Leone... These organizations' familiarity with

<sup>34</sup> "Truth Commission: Peru 01," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-peru-01](http://www.usip.org/publications/truth-commission-peru-01) (Last accessed June 1st 2011).

<sup>35</sup> "Informe Final de la Comisión para la Paz," (April 10<sup>th</sup>, 2003). Available (in Spanish) at: [http://www.usip.org/files/file/resources/collections/commissions/Uruguay-Report\\_Informal.pdf](http://www.usip.org/files/file/resources/collections/commissions/Uruguay-Report_Informal.pdf) (Last accessed 1st June, 2011).

traditional methods of reconciliation and their access to religious and traditional leaders make them very well-suited to initiate and support local reconciliation initiatives.”<sup>36</sup> As already briefly mentioned, in co-ordination with the ‘Inter-Religious Council,’ the UNDP funded reconciliation workshops in each of the twelve districts of Sierra Leone. These workshops attempted to educate communities about reconciliation processes and encouraged the active participation of those involved and affected by past human rights violations. Reconciliation support committees were also created to organise and fund local community building initiatives. Further support also came from the international community; representatives from truth commissions in East Timor, Peru and South Africa shared their experience and assisted with the organisation of a three day workshop focusing on national reconciliation and the role of forgiveness as part of reconciliation processes.<sup>37</sup> Likewise, Rwanda’s commission benefitted from the support of members from the commissions of Germany, South Africa and Namibia.

Ghana’s ‘National Reconciliation Commission’ also benefitted from the widespread involvement of national and international civil society groups, during the drafting of its mandate and throughout its investigation.<sup>38</sup> The involvement of civil society groups often ensures a more balanced, impartial and community-driven approach to proceedings, particularly when these groups represent a society’s various religious and cultural factions. A key feature of the Zimbabwean Truth Commission framework, presented in Chapter 4, is the role which should be played by Zimbabwe’s civil society groups. As well as opening up a vast pool of resources and expertise to the commission’s investigation, the involvement of Zimbabwe’s civil society will also increase its credibility and ensure that it represents the interests of the different identity groups present within Zimbabwean society.

As well improving the operational procedures of commissions, by seeking the support and endorsement of well-established and well-recognised international bodies, the overall credibility of said commissions is significantly strengthened. The Salvadoran Commission

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<sup>36</sup> Pettersson, Bjorn: “Post-Conflict Reconciliation in Sierra Leone: Lessons Learned,” (Report prepared by *International IDEA for the Office of the High Commissioner for Human Rights (OHCHR)*, Geneva, November 2004) p17.

<sup>37</sup> “Sierra Leone Truth and Reconciliation Commission Report,” (October 2004). Available at: <http://humanrightsdoctorate.blogspot.com/2009/11/sierra-leone-truth-and-reconciliation.html> (Last accessed June 1st, 2011).

<sup>38</sup> “Ghana: National Reconciliation Commission Report” (October 2004). Available at: [http://www.ghana.gov.gh/index.php?option=com\\_content&view=article&id=117:the-national-reconciliation-commission-report&catid=59:reports&Itemid=208](http://www.ghana.gov.gh/index.php?option=com_content&view=article&id=117:the-national-reconciliation-commission-report&catid=59:reports&Itemid=208) (Last accessed June 1<sup>st</sup>, 2011).



conducted its investigation under the authority of the United Nations and even submitted its report to the Secretary General of the UN. This undoubtedly increased the commission's authority and legitimacy: "The endorsement of an authoritative body enhanced the commission's legal and political power, access to information, state protection to undertake their investigations and increased likelihood that its conclusions and recommendations would be given serious consideration."<sup>39</sup> Where possible, the United Nations should become more pro-active in assisting the development of truth commission bodies in the future; the benefits of such a course of action are clearly demonstrated by the exploits of the Salvadoran Commission. This commission was also commended for its ability to work alongside other NGOs such as 'The United Nations Observer Mission', 'The National Commission for the Consolidation of Peace', and the 'National Commission for the Protection of Human Rights.'

Argentina's 'National Commission on the Disappearance of Persons' also benefitted from the involvement of international figures and legal experts when drafting its mandate.<sup>40</sup> As Chapter 1 discussed, this document is of vital importance to commissions as it sets out their aims and limitations. By seeking the assistance of experienced international figures and NGO's, commissions can ensure that their mandates are clear and precise, to avoid future disputes. The fact that these NGO's and influential international figures have been so willing to provide this support is a clear indication of the respect and faith they have in truth commissions and their ability to assist nations in political transition. In the future commissions should seek external assistance where possible to increase the success rates of their investigations and overall efficiency.

## 6. Working Alongside other Structures

As well as working alongside other organisations, truth commissions of recent years have demonstrated that they are also able to work alongside other structures. This is essential because it is often the case that commissions are established in conjunction with other institutions or organisations which have been created to achieve similar objectives. It is

<sup>39</sup> Hayner. Priscilla B: 'Questioning the truth: Further Research Questions,' (*Third World Quarterly*, Vol. 17, No. 1, 1996) p21.

<sup>40</sup> "Truth Commission: Argentina," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-argentina](http://www.usip.org/publications/truth-commission-argentina) (Last accessed June 1st 2011).



therefore necessary for commissions, where possible, to coordinate with these structures; cooperation can be mutually beneficial for all concerned.

This was demonstrated aptly by Rwanda's commission. The NURC was praised for its ability to work in conjunction with other mechanisms such as the Gacaca Courts. This partnership proved effective; because the Gacaca Courts were justice-seeking bodies, the NURC was not seen as a replacement for justice. The two structures were also compatible because the NURC was able to pass on to the Gacaca Courts any evidence that might assist with prosecutions.

East Timor's truth commission operated alongside a 'Serious Crimes Unit.' By providing evidence gathered during the commission's investigation, the 'Special Panel for Serious Crimes' was able to successfully convict 84 individuals.<sup>41</sup> As previously mentioned, truth commission bodies often have access to resources which allow them to gather evidence inaccessible to most judicial investigations. By coordinating with judicial bodies, and passing on this evidence, both mechanisms can promote justice and prevent impunity.

## **7. Reforming Societies and Addressing Structural Problems**

A critical part of a state's political transition to democracy is the introduction of reforms to the state's political, social and economic infrastructures; this ensures the state is able to better protect and promote the basic human rights of all its citizens. Truth commissions can influence the reformation process both directly and indirectly.

Though it is not often the case, truth commissions are occasionally granted the authority within their mandates allowing them to introduce reforms to the societies in which they operate in an attempt to prevent the reoccurrences of past atrocities. This was demonstrated by the Rwandan Commission which was granted the authority to make significant changes to aspects of Rwandan societal infrastructures. In particular it focused on reforming the Rwandan education system, by introducing changes to its school syllabuses. Among these changes, the commission decided to create a single narrative version of Rwanda's history; the

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<sup>41</sup> "The Commission for Reception, Truth and Reconciliation: Chega," (October/November 2005). Available at: <http://www.cavr-timorleste.org/en/cheгаReport.htm> (Last accessed 1st June, 2011).

commission believed that it could “cultivate peace and democracy and encourage the rebuilding of social relations.”<sup>42</sup>

It is more often the case that truth commissions can indirectly influence the introduction of societal reforms through the inclusion of reform recommendations within their final reports. Although, this provides less of a guarantee that these changes will be introduced, there are numerous examples where the governments concerned have implemented these suggested reforms.

The reforms recommended by South Africa’s TRC for instance, resulted in the subsequent transformation of the state’s political system, faith communities, businesses, judiciary, prison services, armed forces, health sector, media and educational institutions. It also introduced a ‘follow-up commission’ to oversee the implementation of these reforms. The reform recommendations made by Paraguay, Guatemala and Haiti’s truth commissions also had a strong influence over the subsequent legal and institutional changes which were introduced.

## 8. The Publication of Recommendations

As previously mentioned, one of the ways in which truth commissions can influence change is by formulating sets of recommendations which are published in their final reports following the conclusion of their investigations. These recommendations are then submitted to the state’s leadership for review. A good example of the type of recommendations which are made can be observed by referring to the report published by the Salvadoran Commission. This particular commission published a series of recommendations which were designed to encourage the government to restructure its laws so that they would become more attuned to promoting the basic human rights laws of its citizens: “The mandate of the commission shall include recommending legal, political or administrative measures which can be inferred from the results of the investigation. Such measures may include measures to prevent the repetition of such acts, and initiatives to promote national reconciliation.”<sup>43</sup> It also recommended a comprehensive reparations programme, a strict system of discharge for

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<sup>42</sup> Hodgkin, Marian: ‘Reconciliation in Rwanda: Education, History and the State,’ (*Journal of International Affairs*, Fall/Winter 2006, Vol. 60, No. 1) p202.

<sup>43</sup> “Report of the UN Truth Commission on El Salvador,” (S/25500, April 1993). Available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html> (Last accessed June 1st, 2011), p18.

officers involved in human rights violations and lustration policies which prohibit human rights violators from ever holding office.

Unfortunately for the Salvadoran Commission, as is the case with many other commissions of this kind, it was often left up to the government to decide whether or not to enforce these recommendations. Given the time, money and expertise invested in the investigations of truth commissions, it is advisable for governments to give truth commission recommendations due consideration; not only will the implementation of truth commissions' recommendations prove beneficial for the recovery of the societies concerned, such a course of action will demonstrate a government's commitment to the democratization process.

There are examples where governments have followed through with this commitment. The recommendations published in the report of Morocco's 'Equity and Reconciliation Commission' for example, were not only publically endorsed by King Mohammed VI, but were also drafted into a revised constitution.<sup>44</sup> In a similar way, some of the central recommendations presented in the report of Germany's 'Truth Commission' were also implemented; such as its recommendation to establish an independent foundation to carry out further investigation into East Germany's communist past.<sup>45</sup>

Chapter 4's formation of a three-prong truth commission framework suggests that guarantees should be made by the governments responsible for the establishment of truth commission bodies, to ensure that they review and implement some or all of the recommendations published in these commission reports; this would increase the positive impact commissions are likely to have upon the societies within which they operate.

## 9. Developing/Introducing Reparations Programmes

Another source of support discussed in Chapter 1, which is often provided by truth commissions to victims of human rights violations, is the development and introduction of reparations programmes. Although it not possible to put a price on the emotional costs

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<sup>44</sup> "Morocco: Equity and Reconciliation Commission," (December 1<sup>st</sup>, 2005). Available at: [http://www.moroccanamericanpolicy.org/upload/documents/7\\_20061221082659.pdf](http://www.moroccanamericanpolicy.org/upload/documents/7_20061221082659.pdf) (Last accessed June 1st, 2011).

<sup>45</sup> Kritz, Neil J: "*Transitional Justice: How Emerging Democracies Reckon with Former Regimes*," (United States Institute of Peace Press, Vol.3, Laws, Rulings, and Reports, Washington, DC: 1995) p216-219.

endured by these victims, reparations programmes are deemed to be an appropriate way of compensating them in the absence of more suitable solutions. Ultimately reparations will be supplied either by the state or by external donors; truth commissions are often given the task of deciding which individuals and groups are worthy of this compensation.

There are many examples of the successful implementation of reparations programmes by recent truth commission bodies. Algeria's 'Ad Hoc Inquiry Commission,' for example, developed a successful reparations programme which compensated 2,640 victims families with a total of \$37million.<sup>46</sup> Morocco's 'Equity and Reconciliation Commission' instigated the distribution of \$85million among 16,000 victims.<sup>47</sup> Similar programmes were also developed by the truth commissions of Paraguay and Brazil.

As previously mentioned, truth commissions can also either implement or recommend other measures designed to help restore the dignity of victims and their families. These can take the form of public apologies made by representatives of those responsible, the creation of public memorials and the introduction of public holidays. Guatemala's 'Commission for Historical Classification,' for instance, established a 'National Reparations Commission' which encouraged the President to make a public apology on behalf of the state, and introduced an annual day of remembrance which it called 'The Day of Dignity.'<sup>48</sup> Similarly, as well as influencing the state to enact reparations laws, Germany's truth commission established public memorials at former detention facilities to ensure that East Germany's troubled past would neither be forgotten, nor repeated. Such actions provide solace for victims and send out a powerful message that such atrocities must never be allowed to reoccur.

## 10. Promoting Accountability

As the opening chapter of the thesis discussed, one of the more commonly voiced criticisms of truth commission bodies, is that they are sometimes established in the absence of criminal justice processes. This suggests that truth commission investigations fail to provide

<sup>46</sup> "Truth Commission: Algeria," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-algeria](http://www.usip.org/publications/truth-commission-algeria) (Last accessed June 2nd 2011).

<sup>47</sup> "Morocco: Equity and Reconciliation Commission," (December 1<sup>st</sup>, 2005). Available at: [http://www.moroccanamericanpolicy.org/upload/documents/7\\_20061221082659.pdf](http://www.moroccanamericanpolicy.org/upload/documents/7_20061221082659.pdf) (Last accessed June 1st, 2011).

<sup>48</sup> "Guatemala: Memory of Silence," (AAAS *Science and Human Rights Data Centre*) Available at: <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> (Last accessed May 23, 2011).

accountability and promote impunity. Such claims ignore the ability of a truth commission to work alongside prosecutor bodies, and overlook the accountability obtained through the publication of detailed truth commission reports.

There are numerous examples of truth commissions working alongside judicial bodies and helping them to secure successful convictions. In October 2006, a civil anti-terrorism court used evidence provided by Peru's 'Truth and Reconciliation Commission' to successfully convict the leader of 'The Shining Path' and his deputy to life imprisonment.<sup>49</sup> The same court also delivered lesser sentences to ten other leaders. Similarly, Haiti's 'National Truth and Justice Commission' assisted with the November 2000 'Raboteau Case' in which more than fifty defendants including the entire military high command and the heads of the paramilitary FRAPH were convicted.<sup>50</sup> In Feb 2010, former Uruguayan President Juan Mana Bordaberry was sentenced to 30 years in prison for crimes against humanity, using evidence passed from the 'Commission for Peace' to the Supreme Court.<sup>51</sup> Truth commissions assisted with similar convictions in Guatemala, Chad and South Africa.

In addition, the International Criminal Court has recently used information gathered by the DRC's truth commission in the successful conviction of Thomas Lubanga (leader of the UPC) for recruiting child soldiers under the age of 15.<sup>52</sup> Similarly, it is hoped that evidence gathered by truth commissions operating in the DRC and Kenya will be used in the upcoming trials of Vice-President Jean-Pierre Bemba and 6 top Kenyan officials who are accused of being responsible for masterminding Kenya's recent post-election violence.<sup>53</sup>

Many truth commissions have also encouraged accountability by publishing, in their final reports, information concerning the identity of those individuals and groups guilty of the orchestration of human rights violations. South Africa's well-publicised TRC report, for example, clearly stated the names of individuals who had instigated and implemented

<sup>49</sup> "Shining Path Leader Sentenced to Life," (*International Justice Tribune Archive*, October 23<sup>rd</sup>, 2006).

Available at: <http://www.rnw.nl/international-justice/article/shining-path-leader-sentenced-life> (Last accessed June 2nd, 2011).

<sup>50</sup> "Justice for Haiti: The Raboteau Trial," (*Institute for Justice and Democracy in Haiti*). Available at: [http://ijdh.org/articles/article\\_justice-for-haiti\\_raboteau-trial.php#intro](http://ijdh.org/articles/article_justice-for-haiti_raboteau-trial.php#intro) (Last accessed June 2<sup>nd</sup>, 2011).

<sup>51</sup> "Uruguay's Ex-ruler Bordaberry Jailed for 30 years," (*BBC News Website*, February 11<sup>th</sup>, 2010). Available at: <http://news.bbc.co.uk/1/hi/8511204.stm> (Last accessed June 2nd, 2011).

<sup>52</sup> "Justice in Congo: A Victory for Congo's Children," (*Human Rights Watch*, March 15<sup>th</sup> 2012) Available at: <http://www.hrw.org/node/105817> (last accessed: March 26<sup>th</sup> 2012).

<sup>53</sup> "Lubanga Trial Begins at ICC," (*The Hague Justice Portal*, January 26<sup>th</sup>, 2009). Available at: <http://www.haguejusticeportal.net/eCache/DEF/10/216.html> (Last accessed February 5th, 2009).

Apartheid crimes.<sup>54</sup> Numerous other commissions followed suit, though such policies are only possible if they do not provoke violent backlashes from those exposed or their victims.

The aforementioned examples demonstrate how accountability can be achieved by truth commission bodies, even though they are not granted the powers required to convict criminals.

Having analysed the strengths of recent truth commission enquiries, their contribution towards the reconciliation of transitional and post-conflict states, is evident. These strengths will be strongly considered when developing possible truth commission frameworks in the latter stages of the thesis. Future truth commission architects should assess whether or not their investigations may also benefit from the incorporation of these policies.

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<sup>54</sup> "Truth and Reconciliation Commission of South Africa Report," (21<sup>st</sup> March, 2003). Available at: <http://www.info.gov.za/otherdocs/2003/trc/> (Last accessed 1<sup>st</sup> June 2011).

### **Negative Aspects of Past Truth Commission Investigations:**

Given the nature of the political, social and economic conditions faced by modern-day truth commissions, it is hardly surprising that they have faced many difficulties since their inauguration. Unfortunately for these commissions, it is often the criticisms which develop as a consequence of their failure to deal with these difficulties, which overshadow the positive results which they have achieved in recent history.

The best way to develop truth commission frameworks which can effectively deal with these conditions, without criticism, is to analyse each of these flaws in order to ensure that they are not repeated by future commission enquiries.

The negative aspects of recent truth commission investigations will now be examined:

#### **1. Limited Power/Influence**

A common criticism of modern day truth commissions targets their limited powers in comparison to alternative mechanisms which seek to deal with gross human rights violations. It is often claimed that this lack of influence makes these commissions appear weak; the various restrictions placed upon commissions by their mandates, leave them ill-equipped when dealing with difficult political, social and economic pre-conditions.

This criticism is often fuelled by the following inadequacies which often hamper the perceived success of truth commission investigations:

- i. Truth commissions cannot convict guilty parties

One specific characteristic which strengthens this argument is the lack of powers of prosecution granted to modern-day truth commissions. This handicap prevents these organs from punishing those individuals and groups found guilty during their investigations. It is for this reason that those in favour of retributive justice processes see truth commissions as inadequate replacements for more powerful and influential judicial bodies. This is a common misconception; as already discussed, truth commissions are often granted alternative powers to judicial bodies and better access to evidence. As previously mentioned, truth commissions



are also most effective when they work alongside judicial bodies, as they can often provide them with invaluable evidence which frequently leads to successful convictions.

That being said, in many instances truth commissions are employed as isolated organs. On these occasions, where commission mandates are particularly restrictive, critics may be justified in claiming that truth commissions do suffer from a distinct lack of authority.

ii. Truth commissions are often prevented from disclosing legal responsibility

In the absence of the powers of prosecution, the next best way in which truth commissions can promote accountability is through the disclosure of the names of guilty parties within their final reports. This is not uncommon and despite the absence of punishment, can satisfy the accountability demands of victims.

However, past truth commission bodies have been further weakened by mandate restrictions which have prohibited this course of action. Panama's 'Truth Commission' for example, was explicitly prohibited from making any conclusions regarding the legal responsibilities of individual perpetrators. This heavily hampered the impact of its investigation.<sup>55</sup> Similar restrictions were also placed on Guatemala's 'Commission for Historical Classification,' which prevented it from naming names or calling for prosecutions in its final report, despite the evidence gathered during its investigation.<sup>56</sup> Such policies are often implemented due to fragile political conditions which could be endangered by the inclusion of the names of guilty parties in truth commissions' final reports.

iii. Truth commissions are often unable to provide compensation to victims

As previously discussed, an additional way in which truth commissions help to rehabilitate post-conflict societies is through the introduction of reparations programmes to compensate victims for the hardships they have endured. As well as fulfilling an obligation under international law to compensate the victims of state enforced crimes<sup>57</sup>, this is also an

<sup>55</sup> Jackson, Eric. "Review of Panama Truth Commission Report." *NY Transfer News*, May 27, 2002. Available at: [http://www.blythe.org/nytransfer-sub/Covert\\_Actions/Review\\_of\\_Panama\\_Truth\\_Commission\\_Report](http://www.blythe.org/nytransfer-sub/Covert_Actions/Review_of_Panama_Truth_Commission_Report) (accessed May 23, 2011).

<sup>56</sup> "Guatemala: Memory of Silence," AAAS *Science and Human Rights Data Centre*. Available at: <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> (accessed May 23, 2011).

<sup>57</sup> Amezcua-Noriega, Octavio: "Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections," *University of Essex, Reparations Unit*, Briefing Paper

alternative means of satisfying the needs and demands of victims in the absence of criminal prosecutions. However, for this to be possible, truth commissions have to rely upon the financial support of domestic and international sources; recent history has shown that this support is not always forthcoming.

Sierra Leone's 'Truth and Reconciliation Commission' for example, was heavily hampered by the restrictions placed upon it by its mandate. These restrictions prevented it from providing the victims of the civil war with the socio-economic empowerment that they badly needed. As a result the citizens of Sierra Leone felt that real justice had not been served because without material compensation they would still be feeling the effects of the civil war long after the commission had finished its work: "Truth telling without reparation could be perceived by the victims as an incomplete process, in which they revealed their pain and suffering, without any mechanism in place to deal with the consequences of that pain."<sup>58</sup> Instead all the commission could do was include reparations recommendations within its final report.

South Africa's 'Truth and Reconciliation Commission' promised much in the way of financial compensation for Apartheid's numerous victims. However, when it came to the distribution of these reparations, the ANC government refused to release the money required to make this possible: "On April 15, as he addressed the TRC's report, Mbeki said he had authorized a one-time payment of approximately US\$74 million—\$300 million less than the sum recommended by the commission."<sup>59</sup> This has only further increased the economic imbalance which continues to impoverish large sectors of South Africa's populace.

These are a few examples of many, which show that the failure of modern truth commissions to develop successful compensation programmes for victims is not uncommon, irrespective of whether or not such powers are drafted into their mandates; their reliance upon unreliable domestic and international donors, continues to weaken their overall impact upon the rehabilitation of post-conflict societies.

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No.1, August 2011. Available at: [http://www.essex.ac.uk/tjn/documents/paper\\_1\\_general\\_principles\\_large.pdf](http://www.essex.ac.uk/tjn/documents/paper_1_general_principles_large.pdf) (Last accessed October 14th, 2012).

<sup>58</sup> Sesay, Amadu: "Does One Size Fit All? The Sierra Leone TRC Revisited," (*Discussion Paper* 36) p51.

<sup>59</sup> Meron Tesfa, Michael: "Moment of Truth," (*WorldPress.org*, May 2<sup>nd</sup>, 2003). Available at: <http://www.worldpress.org/Africa/1077.cfm> (Last accessed June 2nd, 2011).

- iv. Truth commissions are often unable to involve guilty parties within their investigations

In order for truth commission investigations to be successful, it is critical that they seek to engage both victims and perpetrators throughout their investigations; this will significantly increase the lasting impact of their work. It is hardly surprising though that the testimonies of guilty parties are not always forthcoming. In such situations, truth commissions require the power of subpoena in order to force their involvement.

The influence of recent truth commissions has been heavily undermined by the absence of these powers, within their mandates. South Korea's 'Presidential Truth Commission on Suspicious Deaths' failed to gain the co-operation of many high ranking officials because it lacked the legal authority to force them to testify.<sup>60</sup> Similarly, the powers granted within the mandate of Uruguay's 'Commission for Peace' were so limited that it relied solely upon statements taken from those who gave them voluntarily. This commission also lacked the power to carry out further investigation and relied upon one support staff member.

The absence of the powers of subpoena, heavily weaken the ability of modern-day truth commissions to carry out thorough and all-inclusive investigations.

- v. Truth commissions are often unable to influence comprehensive reform

Lastly, it is often the case that the overall authority of truth commissions is heavily undermined by their inability to influence the introduction of comprehensive societal reform. In most cases the main way in which truth commission investigations can influence societal reform is through the publication of reform recommendations within their final reports. As previously mentioned, it is not always likely that these recommendations will be implemented: "Even if it produces an incisive list of recommendations, there is no guarantee that the political will, financial resources and administrative capacity will be able to implement reforms."<sup>61</sup>

Unfortunately for truth commissions, their adjudged success or failure is often reliant upon whether or not their recommendations are implemented. They are therefore heavily

<sup>60</sup> "A Hard Journey to Justice: First Term Report 10.2000-10.2002," (Seoul: Samin Books, 2004).

<sup>61</sup> Dougherty, Beth K: 'Searching for Answers: Sierra Leone's truth and Reconciliation commission,' (*African Studies Quarterly*, Vol. 8, Issue 1, Fall 2004) p51.

dependent upon their government's own agenda. Future truth commission investigations should be strengthened by the inclusion of required legal powers, within their mandates; this will increase the overall impact their operations are likely to have upon post-conflict societies, such as those mentioned here.

## **2. Lack of Government Support**

In the previous section we briefly discussed how the success of truth commissions rely heavily upon the policies and practices of the governments they serve. Analysis of past truth commissions shows that they have been continually hampered by uncooperative and unsupportive governments. This is often the case, even when these same governments are responsible for the founding of these commissions.

There is much evidence to suggest that Sierra Leone's government, for example, was not committed to the pursuit of a comprehensive reconciliation process; demonstrated by the lack of support it gave its commission and its unwillingness to work with its opposition parties. It also made no attempt to implement the recommendations published in the commission's final report. In a similar way, Uganda's government showed little interest in supporting its commission; it clearly regarded it as 'backward-looking' and prioritised the rebuilding of its nation's economy over defending the basic rights of its people.

Truth commissions operating in Paraguay, Ghana, Panama and Nigeria also suffered from a distinct lack of government support. These particular commissions suffered from the continual withdrawal of government funding. Paraguay's 'Truth and Justice Commission' was hit particularly hard by funding cuts. In 2007 the Paraguayan government cut the commission's budget by half; as a result the commission's investigation had to stop for two months whilst it reassessed its funding options.<sup>62</sup> Meanwhile the Nigerian government's half-hearted commitment to its commission's recommended reparations programme, heavily weakened the assistance it was able to provide the victims it was created to serve.

In addition, the Zimbabwean government even refused to issue the final report of its 1983 truth commission, claiming that it might endanger Zimbabwe's fragile peace; it is clear that

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<sup>62</sup> "Truth Commission: Paraguay," (*The United States Institute of Peace*). Available at [www.usip.org/publications/truth-commission-paraguay](http://www.usip.org/publications/truth-commission-paraguay) (Last accessed June 1st 2011).

the publication of this report might also expose the role played by ZANU PF's armies during the Matabeleland Massacres. As a consequence, two Zimbabwean human rights organisations took it upon themselves to publish unofficial reports of said events.<sup>63</sup> Inevitably these reports were not endorsed by Mugabe's government, but instead general amnesties were granted to pardon those responsible.

This raises the question of why these governments would establish truth commissions without any intention of supporting their investigations. This thesis links these policies to the type of political transitions which occurred, prior to the government's establishment. It might be suggested for example that a newly established government which 'overthrew' its predecessor might be more co-operative than a 'reformed' government. This is because the reformed government may still contain representatives of the old regime who may hinder their state's commitment to reform. Such claims will be looked at in further detail, because they imply that the success or failure of a truth commission may well be dependent upon the type of political transition which the controlling government has undergone. This argument heavily influences the truth commission framework development approach presented in Chapter 4.

### 3. Manipulation of Truth Commissions

Their possible manipulation is one of the more serious problems faced by modern day truth commissions. Unfortunately, it would appear that there are many occasions where commissions have been established by governments to achieve hidden objectives that were not stated in the commission's mandate and were certainly not morally just.

Critics have claimed that recent truth commissions have been subject to manipulation by governments by the following means:

- i. Using truth commissions as 'exit strategies'

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<sup>63</sup> Dabudabu, Masola Wa: "Another Commission to Clean after Mugabe," (*NewZimbabwe.com*, December 11<sup>th</sup>, 2009). Available at: <http://www.newzimbabwe.com/pages/masola20.12770.html> (Last accessed June 2nd, 2011).

It has been suggested that Sierra Leone's 'Truth and Reconciliation Commission' for example, was engineered by those responsible for the civil war as an exit strategy: "It is possible that the TRC and even the Special Court might have been used as part of an elaborate exit strategy for the guarantors of the peace process."<sup>64</sup> Indeed the lack of post-conflict cooperation provided by both the government and the RUF suggests that neither was ever really committed to comprehensive transitional justice processes in Sierra Leone, but instead used these organs to create the illusion that accountability would be established. Sesay argues that this problem is commonplace among many recent truth commissions: "This problem has been compounded by the fact that external engagements in post-war or post-conflict reconciliation and reconstruction projects in many parts of the world are not only transient, but are at one level also elaborate exit strategies for the guarantors of peace agreements."<sup>65</sup> This thesis suggests that the use of truth commissions as 'exit strategies' is highly dependent on the characteristics of the political transitions which have taken place. In Sierra Leone, the ending of the civil war resulted from a political compromise between the government and the RUF; the nature of this specific transition meant that the transgressors were also the 'guarantors' of Sierra Leone's peace process. As a consequence the government and the RUF were able to walk away from the civil war without being subjected to a comprehensive accountability process. Similar manipulations can occur when the guarantors of transitional justice processes are 'politically reformed;' those in charge are also often responsible for the atrocities which have occurred.

## ii. Manipulating the evidence/scope of truth commission investigations

Uganda's government has been accused of manipulating the evidence gathered by its commission in order to protect its own interests. It has also been suggested that it manufactured the timeframe investigated by its commission so that it was unable to investigate various atrocities carried out by Museveni's government.<sup>66</sup> Similar concerns were raised over the case selection investigation process implemented by Nigeria's truth commission. The scope of Morocco's 'Equity and Reconciliation Commission' investigation was also under suspicion of manipulation; its final report remained silent about gross human rights violations committed in the Western Sahara (many considered this to be the hardest hit

<sup>64</sup> Sesay, Amadu: "Does One Size Fit All? The Sierra Leone TRC Revisited," (*Discussion Paper 36*) p28.

<sup>65</sup> Sesay, Amadu: "Does One Size Fit All? The Sierra Leone TRC Revisited," (*Discussion Paper 36*) p52.

<sup>66</sup> Joanna, Quinn: "An Analysis of Uganda's Truth Commission," (*YCISS Working Paper Number 19*, March 2003)

area).<sup>67</sup> Questions were even raised over the legitimacy of the Salvadoran Commission which was established and run by the United Nations. Observers struggled to understand how the final report failed to incriminate either the guilty US advisors or President Cristiani. Given the significance of the role played by both, one might be forgiven for suggesting that the commission was manipulated or influenced into excluding these two contributors from its investigation. The government of El Salvador was also continually suspected of perverting the course of justice through the destruction of evidence and its continual lack of co-operation with its commission's investigation. It was also believed to be concealing the location of the bodies of prisoners and victims: "The Salvadoran commission wrote that one thing must be squarely denounced: owing to the destruction or concealment of documents, or the failure to divulge the locations where the numerous persons were imprisoned or bodies buried, the burden of proof frequently reverted to the commission, the judiciary and the citizens who found themselves forced to reconstruct events."<sup>68</sup> When the commission's report was published, it was condemned as being biased and inaccurate by the government, more than likely because many of its members were incriminated by the report.

### iii. Using truth commissions to increase perceived legitimacy

The objectives of Rwanda's government in establishing the NURC have also been brought into question. Aryeh Neier has suggested that the Rwandan government had little interest in defending the rights of its citizens, but used its commission to give the impression that it did: "It (the NURC) has mostly benefited the Rwandan government, who can point to it as evidence of its commitment to the project of reconciliation."<sup>69</sup> This was important to the government because it needed to convince both its citizens and international actors that it was a legitimate government that intended to restore order in Rwanda, to avoid any threat to its leadership. Such strategies are not uncommon.

### iv. Failure to select impartial and unbiased truth commissioners

Concerns were also voiced over the Chilean Commission; observers stressed their concern over the impartiality of the selected commission members. One commissioner was even a

<sup>67</sup> "Morocco: Equity and Reconciliation Commission," (December 1<sup>st</sup>, 2005). Available at: [http://www.moroccanamericanpolicy.org/upload/documents/7\\_20061221082659.pdf](http://www.moroccanamericanpolicy.org/upload/documents/7_20061221082659.pdf) (Last accessed June 1st, 2011).

<sup>68</sup> "Report of the UN Truth Commission on El Salvador," (S/25500, April 1993). Available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html> (Last accessed June 1st, 2011).

<sup>69</sup> Neier, Aryeh: "A Brief History of the Conflict," (U.C. Berkley War Crimes Studies Centre) p8.

member of Pinochet's cabinet.<sup>70</sup> The Democratic Republic of Congo's Truth Commission was accused of similar misgivings. In this instance, some the selected commissioners had informal ties with those implemented in the crimes under investigation.<sup>71</sup> To avoid such accusations, the commissioner selection processes must be carefully planned to guarantee the selection of unbiased, impartial commissioners.

As soon as the legitimacy of one commission is questioned, critics begin raising questions about the legitimacy of others. It is critical that truth commissions are only ever established by governments in order to promote truth, reconciliation and the defence of human rights, without hidden objectives. The manipulation of future truth commissions must be prevented in order to promote their perceived integrity as highly effective and impartial transitional justice bodies.

#### 4. Encouraging Impunity

"Amnesties go hand in hand with cover-ups... In other words amnesty means wiping out the crime as well as the responsibility of the criminal, and is aimed at wiping out the memory of the dead."<sup>72</sup>

Another concern commonly voiced by truth commission critics, surrounds the promotion of impunity which can result from the granting of amnesties before, during or after truth commission investigations. The opening chapter of the thesis addressed the contentious debate surrounding the morality of amnesty processes; the main consequence of which makes it impossible to prosecute those responsible for mass violations of human rights: "Amnesty in the context of national reconciliation involves waving or cancelling the punishment of convicted or suspected criminals in the name of peace."<sup>73</sup> Its critics believe that true reconciliation can only really be achieved through punishment, and that amnesty sacrifices traditional justice.

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<sup>70</sup> "Truth Commission: Chile 03," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/commission-inquiry-chile-03](http://www.usip.org/publications/commission-inquiry-chile-03) (Last accessed June 2nd 2011).

<sup>71</sup> "Truth Commission: Democratic Republic of Congo," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-democratic-republic-congo](http://www.usip.org/publications/truth-commission-democratic-republic-congo) (Last accessed June 2nd 2011).

<sup>72</sup> Gutierrez, Jose: "Truth commission Report Shakes El Salvador," (31 March 1993). Available at: <http://www.greenleft.org.au/node/4338> (Last accessed June 2nd, 2011) p2.

<sup>73</sup> Bennett, Christopher: "Is amnesty a Collective Act of Forgiveness?" (*Contemporary Political Theory*, Vol. 2, 2003) p67.



Though the granting of ‘conditional amnesties’ are sometimes used by truth commissions to encourage perpetrators to come forward and reveal the truth behind past atrocities, (South Africa’s TRC successfully used conditional amnesties in this way), difficulties arise when ‘blanket amnesties’ are granted prior to the commencement of commission investigations. This means that there is very little incentive for the guilty parties to come forward and assist them with their investigations, as they are already immune from prosecution.

Sierra Leone’s TRC was faced with this exact problem: “Unlike in South Africa, where perpetrators received amnesty only in return for truthful testimony, ex-combatants in Sierra Leone already had amnesty and therefore lacked the incentive to testify.”<sup>74</sup> A general amnesty was also granted following the publication of El Salvador’s Truth Commission report making it impossible to punish those that the commission had found to be responsible for the crimes committed during the Civil War: “While the Amnesties covered acts committed by all parties to the conflicts, the state was the main beneficiary as its agents committed the majority of the violations.”<sup>75</sup> This can be seen as one of the adverse consequences of ‘reformed’ or ‘compromised’ transitions; the new government is allowed to create a situation whereby it is untouchable, despite the decisive part it played in proceedings. Likewise, the 1987 Amnesty Law, which was introduced by Pinochet in Chile to ensure that neither himself nor any of the members of his military would be punished for the atrocities they committed, severely hampered the progress of the Chilean Commission: “Certain elements of society found themselves immune from any governmental or political constraints and thus forged for themselves the most abject impunity.”<sup>76</sup>

It is therefore necessary to understand, irrespective of our feelings towards the amnesty process, that truth commissions may not be as effective at uncovering the truth surrounding past events if blanket amnesties have been granted prior to the commencement of their investigations. Unfortunately for these commissions, amnesty is often the price which has to be paid for achieving peace at the point of transition. It is important for the architects of future commissions to account for the constraints of blanket amnesties if they have already

<sup>74</sup> Dougherty, Beth K: “Searching for Answers: Sierra Leone’s truth and Reconciliation commission,” (*African Studies Quarterly*, Vol. 8, Issue 1, Fall 2004) p47.

<sup>75</sup> Gairdner, David: “The Role of truth commissions in political Transition in Chile and El Salvador,” (*Chr. Michelsen Institute, Development Studies and human rights*, R 1998: 8) p32.

<sup>76</sup> “Report of the UN Truth Commission on El Salvador,” (S/25500, April 1993). Available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html> (Last accessed June 1st, 2011).

been enforced. These constraints should also be considered when developing the truth commission frameworks in Chapter 4 of this thesis.

Of course the granting of blanket amnesties is not the only way in which impunity can develop. It can also result from the failure of truth commissions to establish accountability; although amnesties prevent guilty parties from being punished, they do not prevent the publication of the names of guilty parties within truth commission's final reports; such policies are usually enforced by the architects of truth commission mandates.

The mandate of Morocco's 'Equity and Reconciliation Commission' for example, prevented it from naming the names of guilty parties within its final report, and in doing so prevented victims from gaining accountability. Those present at the commission hearings even had to sign agreements guaranteeing that they would not reveal the identities of guilty parties exposed during the process.<sup>77</sup> In a similar way, Panama's Truth Commission was prohibited from making any verdicts surrounding the legal responsibilities of individual perpetrators.

This lack of accountability is further upheld by commissions who refuse to publish any form of report after the cessation of their investigations. Algeria's 'Ad Hoc Enquiry Commission' for example, only passed on information gained during its enquiry through selective public statements made by the chairman of the commission; no final report was presented.<sup>78</sup> To shroud its responsibility, Zimbabwe's ZANU PF government also refused to publish the report written by its truth commission investigating the Matabeleland massacres of the 1980s.<sup>79</sup>

The impunity encouraged by the aforementioned case studies has served to weaken the credibility and operational impact of truth commission bodies. The architects of future commissions should ensure that their commissions are designed to promote accountability where possible and prevent the development of impunity to protect the often tarnished image of these structures.

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<sup>77</sup> "Truth Commission: Morocco," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-morocco](http://www.usip.org/publications/truth-commission-morocco) (Last accessed June 2nd 2011).

<sup>78</sup> "Truth Commission: Algeria," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-algeria](http://www.usip.org/publications/truth-commission-algeria) (Last accessed June 2nd 2011).

## 5. Unclear Mandates

The development of a strong, well-structured mandate is an integral part of a truth commission's overall design. The most successful commissions have clear and coherent mandates which provide commissioners with strict operational guidance; past truth commission architects have often failed to acknowledge this. As a consequence, problems can ensue after the commission commences its investigation. Commissions with unclear and unrestrictive mandates often digress from their objectives. They are also in danger of taking on investigations which they are not equipped to handle and, as a result, end up with inconclusive findings.

Without realistic goals commissions are also in danger of running out of funding and fail to meet their operational deadlines; it is impossible for commissions to be regarded as successful if they are not realistic about their objectives. This was demonstrated by Sierra Leone's Commission whose mandate was so open-ended that it was unable to focus on any specific area of its investigation. As a result, it failed to fulfil its central objective as Pettersson argues: "Most political analysts would argue that the government has not effectively addressed many of the causes behind the war."<sup>80</sup>

Neier claims that Rwanda's NURC suffered from the same inadequacies: "The National Unity and Reconciliation Commission suffers from the lack of a clearly defined agenda and plan as well as a fairly small budget, and unless it reforms significantly, it will not likely improve its efforts to build a firm foundation on unity and reconciliation."<sup>81</sup>

The Democratic Republic of Congo's Truth Commission actually operated for an entire year without a mandate; as a consequence it lacked any sense of direction or operational structure.<sup>82</sup> Brazil's 'Commission of Enquiry' even operated without any mandate whatsoever; the consequences of which were plain to see.<sup>83</sup>

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<sup>80</sup> Pettersson, Bjorn: "Post-Conflict Reconciliation in Sierra Leone: Lessons Learned," (Report prepared by *International IDEA for the Office of the High Commissioner for Human Rights (OHCHR)*, Geneva, November 2004) p16.

<sup>81</sup> Neier, Aryeh: "A Brief History of the Conflict," (U.C. Berkley War Crimes Studies Centre) p8.

<sup>82</sup> "Truth Commission: Democratic Republic of Congo," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/truth-commission-democratic-republic-congo](http://www.usip.org/publications/truth-commission-democratic-republic-congo) (Last accessed June 2nd 2011).

<sup>83</sup> "Truth Commission: Brazil," (*The United States Institute of Peace*). Available at: [www.usip.org/publications/commission-inquiry-brazil](http://www.usip.org/publications/commission-inquiry-brazil) (Last accessed June 2nd 2011).